

No. 15033

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**United States**  
**Court of Appeals**  
for the Ninth Circuit

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GILBERT RIPKA and WILSON BROTHERS  
TRUCK LINES, INC., a Corporation,  
Appellants,

vs.

CHARLES CREHORE, General Administrator of  
the Estate of Herbert Noah Sanders and  
Delphia F. Sanders,

Appellee.

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**Transcript of Record**

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Appeal from the United States District Court for the  
District of Arizona

FILED  
APR -9 1956



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District of Arizona**





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court  
for the District of Arizona

Civil Action No. 411-Bret.

RALPH WANEK, Administrator of the Estates of  
HERBERT NOAH SANDERS and DEL-  
PHIA F. SANDERS, Deceased,

Plaintiff,

vs.

GILBERT RIPKA, WILSON BROTHERS  
TRUCK LINES, INC., a Corporation, ROB-  
ERT WILSON and BENNETT WILSON,  
Individually and Doing Business as WILSON  
BROTHERS TRUCK LINE, a Co-Partner-  
ship, JOHN DOE ONE, JOHN DOE TWO,  
JOHN DOE THREE, BLACK CORPORA-  
TION, a Corporation, and WHITE CORPO-  
RATION, a Corporation,

Defendants.

AMENDED COMPLAINT AND  
DEMAND FOR JURY TRIAL

First Cause of Action

I.

Plaintiff herein is a citizen of the State of Arizona, and is, pursuant to and under the laws of the State of Arizona, the duly appointed, qualified and acting Administrator of the Estate of Herbert Noah Sanders, deceased, and of the Estate of Delphia F. Sanders, deceased. The defendant Gilbert Ripka, is a non-citizen of the State of Arizona, and is a citizen of the State of Indiana. The defendant,

Wilson Brothers Truck Lines, Inc., a corporation, is now and during all the times hereinafter mentioned was a corporation duly organized and existing, and plaintiff is informed and believes, and upon such information and belief alleges that said Wilson Brothers Truck Lines, Inc., is a corporation incorporated under the laws of the State of Missouri. The defendants Robert Wilson and Bennett Wilson are non-citizens of the State of Arizona, and plaintiff is informed and believes, and upon such information and belief alleges that Robert Wilson and Bennett Wilson are citizens of the State of Missouri, and are now and during all the times hereinafter mentioned, were doing business individually and as co-partners under the firm name and style of Wilson Brothers Truck Line. The defendants John Doe One, John Doe Two, John Doe Three, Black Corporation, a corporation, and White Corporation, a corporation, are parties whose true names are not now known to plaintiff, and plaintiff asks leave to insert the true names of said defendants herein by amendment when the same have been determined. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

## II.

On July 10, 1954, at approximately Three o'Clock A.M., the decedent Herbert Noah Sanders and the decedent Delphia F. Sanders were riding in an automobile on a public highway called U. S. Highway 66 at a point approximately 7.5 miles west of the City of Flagstaff, in Coconino County, State of Ari-

zona. At said time and place the defendant Gilbert Ripka willfully or recklessly or negligently drove or caused to be driven a heavy truck across the center line of said U. S. Highway 66 and into the automobile then and there occupied by said decedents.

### III.

At said time and place the defendant Gilbert Ripka was operating said heavy truck for and on his own behalf, and for and on behalf of the defendants Wilson Brothers Truck Line, Inc., Robert Wilson and Bennett Wilson, individually and doing business as Wilson Brothers Truck Line, a co-partnership, John Doe One, John Doe Two, John Doe Three, Black Corporation, a corporation, and White Corporation, a corporation, and as the agent, servant or employee of all the said defendants and in the course and scope of the employment of the defendant Gilbert Ripka by said defendants and by each of them.

### IV.

As the direct and proximate result of the willfulness or recklessness or negligence of the defendant Gilbert Ripka, as aforesaid, the said Herbert Noah Sanders and the said Delphia F. Sanders were mortally hurt and they died.

### V.

The decedent Herbert Noah Sanders was, prior to his death, an able bodied man of forty-six years of age. As a result of the willfulness or recklessness or negligence of the defendants as aforesaid, the Estate of the said Herbert Noah Sanders has been dam-

aged in the sum of One Hundred Fifty Thousand Dollars.

Wherefore, plaintiff demands judgment against the defendants in the sum of One Hundred Fifty Thousand Dollars, and costs.

## Second Cause of Action

### I.

Plaintiff refers to and incorporates by reference Paragraphs I, II, III and IV of the First Cause of Action.

### II.

The decedent Delphia F. Sanders was, prior to her death, an able bodied woman of thirty-nine years of age, gainfully employed as a housewife. By reason of the willfulness, or recklessness or negligence of the defendants, as aforesaid, the Estate of the said Delphia F. Sanders has been damaged in the sum of Seventy-Five Thousand Dollars.

Wherefore, plaintiff demands judgment against the defendants in the sum of Seventy-Five Thousand Dollars, and costs.

MANGUM & FLICK,

By /s/ H. K. MANGUM.

LEWIS, ROCA, SCOVILLE  
& BEAUCHAMP,

By /s/ HAROLD R. SCOVILLE,

J. ADRIAN PALMQUIST,  
/s/ J. ADRIAN PALMQUIST,  
Attorneys for Plaintiff.

Demand for Jury Trial

Plaintiff hereby demands a trial by jury of the above entitled causes.

MANGUM & FLICK,

By /s/ H. K. MANGUM.

LEWIS, ROCA, SCOVILLE  
& BEAUCHAMP,

By /s/ HAROLD R. SCOVILLE,

/s/ J. ADRIAN PALMQUIST,  
Attorneys for Plaintiff.

[Lodged]: Dec. 3, 1954.

[Endorsed]: Filed Dec. 17, 1954.

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[Title of District Court and Cause.]

ANSWER OF DEFENDANT GILBERT RIPKA

First Defense

I.

Defendant alleges that Herbert Noah Sanders and Delphia F. Sanders were husband and wife and that they left surviving them four children, Wilma Fern Sanders, Norma Sanders, Wanda Sanders and Linda Sanders as their sole heirs at law, and that said Herbert Noah Sanders and Delphia F. Sanders at the time of their death left no estate



or property within the State of Arizona other than the claimed action for wrongful death described in plaintiff's complaint; that Wilma Fern Sanders is a resident of the State of Pennsylvania and in any event not a resident of the State of Arizona, and that Norma Sanders, Wanda Sanders and Linda Sanders are residents and citizens of the State of California and that under the provisions of Chapter 31, A.C.A. 1939, the action sought to be prosecuted herein is one for the benefit of said Wilma Fern Sanders, Norma Sanders, Wanda Sanders and Linda Sanders and that they are the real parties in interest; and defendant therefore alleges that plaintiff is not entitled to the relief prayed for in the complaint on file herein in this jurisdiction in that no real party in interest to this suit is a resident of the district wherein the action is brought and presently pending;

## Second Defense

### I.

Defendant alleges he is without knowledge or information sufficient to form a belief as to the matters and things set forth in paragraph I of plaintiff's complaint.

### II.

Defendant admits the allegations of paragraph II of said complaint.

### III.

Defendant admits the allegations of paragraph III of said complaint.

## IV.

Answering paragraph IV of said complaint, defendant admits that a collision occurred at the time and place alleged between the vehicles described; defendant denies that the driver of the 1949 Hudson sedan was driving said automobile in a careful and prudent manner at the time of the collision, alleging in this respect that the driver of said Hudson automobile operated the same in a careless and reckless manner and over the center line of said highway and onto the wrong side thereof; and defendant denies that he operated his motor vehicle at said time and place in any improper or reckless, negligent and careless fashion and denies that he drove the same over the center line of said highway and into the lane of traffic then being occupied by said Hudson automobile.

## V.

Defendant admits that decedents suffered fatal injuries in the accident described, alleging in this respect that their sole negligence was the cause thereof; defendant denies all remaining allegations of paragraph V.

## VI.

Answering paragraph VI, defendant alleges he is without knowledge or information sufficient to form a belief as to the matters and things therein alleged except defendant denies he was guilty of any reckless, negligent or unlawful acts or that he was in any respect responsible for the death of said Herbert Noah Sanders.

## VII.

Answering paragraph VII, defendant denies the allegations thereof.

## VIII.

Further answering said first cause of action, defendant denies each and every, all and singular, the allegations thereof except such thereof as have hereinbefore been expressly admitted.

## Third Defense

## I.

Defendant for his third defense alleges that the accident and fatal injuries of said Herbert Noah Sanders were proximately caused and contributed to by his own negligence and inattention at the time and place of the collision.

Wherefore, having fully defended against said complaint, defendant prays plaintiff take nothing thereby; for his costs; for such other and further relief as may be proper.

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Defendant.

## Answer to Second Cause of Action

## I.

Comes Now defendant and for his first defense to plaintiff's second cause of action incorporates herein



by reference his first defense to plaintiff's first cause of action.

## II.

Defendant adopts by reference his answer to paragraphs I, II, III, IV and V of the first cause of action as incorporated in the second cause of action by reference.

## III.

Answering paragraph II of the second cause of action defendant alleges he is without knowledge or information sufficient to form a belief as to the matters and things therein set forth, excepting defendant denies he was in any fashion negligent or reckless and denies he was guilty of any unlawful and wanton or other improper conduct.

## IV.

Further answering said second cause of action, defendant denies each and every, all and singular, the allegations thereof except such thereof as have hereinbefore been expressly admitted.

## Third Defense

### I.

Defendant alleges that Delphia F. Sanders was the wife of Herbert Noah Sanders, the operator of the Hudson automobile involved in the collision; that said Herbert Noah Sanders was guilty of negligence and inattention at the time and place of the collision which caused and contributed to the fatal injuries suffered by Delphia F. Sanders and that the negligence of said Herbert Noah Sanders, being

then and there the husband of said Delphia F. Sanders, is imputed to said Delphia F. Sanders and her estate.

Wherefore, having fully defended against said complaint, defendant prays plaintiff take nothing thereby; for his costs; for such other and further relief as may be proper.

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Defendant.

Copy mailed.

[Endorsed]: Filed Aug. 2, 1954.

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[Title of District Court and Cause.]

ANSWER OF WILSON BROTHERS TRUCK  
LINES, INC., A CORPORATION, AND  
ROBERT WILSON AND BENNETT WIL-  
SON, INDIVIDUALLY AND DOING BUS-  
INESS AS WILSON BROTHERS TRUCK  
LINE, A CO-PARTNERSHIP, TO PLAIN-  
TIF'S AMENDED COMPLAINT

Come Now Wilson Brothers Truck Lines, Inc., a corporation, and Robert Wilson and Bennett Wilson, individually and doing business as Wilson Brothers Truck Line, a co-partnership and for their answer to plaintiff's amended complaint allege as follows:

## First Defense

## I.

Defendants allege that Herbert Noah Sanders and Delphia F. Sanders were husband and wife and that they left surviving them four children, Wilma Fern Sanders, Norma Sanders, Wanda Sanders and Linda Sanders as their sole heirs at law and that said Herbert Noah Sanders and Delphia F. Sanders at the time of their death left no estate or property within the State of Arizona, other than the claimed action for wrongful death described in plaintiff's complaint; that Wilma Fern Sanders is a resident of the State of Pennsylvania, and in any event not a resident of the State of Arizona; and that Norma Sanders, Wanda Sanders and Linda Sanders are residents and citizens of the State of California, and that under the provisions of Chapter 31, A.C.A. 1939, the action sought to be prosecuted herein is one for the benefit of said Wilma Fern Sanders, Norma Sanders, Wanda Sanders and Linda Sanders, and that they are the real parties in interest, and defendants therefore allege that plaintiff is not entitled to the relief prayed for in the complaint on file herein in this jurisdiction in that no real party in interest to this suit is a resident of the district wherein the action is brought and presently pending.

## Second Defense

## I.

Answering paragraph I of plaintiff's first cause of action, these defendants are without knowledge

or information sufficient to form a belief as to the allegations pertaining to plaintiff's appointment or qualifications as acting administrator of the estate of Herbert Noah Sanders, deceased, and of the estate of Delphia F. Sanders, deceased. These defendants admit the remaining allegations therein contained, except that defendants Robert Wilson and Bennett Wilson deny that they are now doing business individually and as co-partners under the firm name and style of Wilson Brothers Truck Line.

## II.

Answering paragraph II of plaintiff's first cause of action, these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained.

## III.

Answering paragraph III of plaintiff's first cause of action, these defendants deny that said defendant Gilbert Ripka was operating said heavy truck for and on behalf of these defendants or any of them and further deny that said defendant Gilbert Ripka was at said time and place acting as the agent, servant, or employee in the course and scope of employment by these defendants or any of them.

## IV.

Answering paragraph IV of plaintiff's amended complaint, these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained.

## V.

Answering paragraph V of plaintiff's amended complaint, these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained.

## Third Defense

Defendants for their third defense allege that the accident and fatal injuries of said Herbert Noah Sanders were proximately caused and contributed to by his own negligence and inattention at the time and place of the collision.

Wherefore, having fully defended against said first cause of action, defendants pray plaintiff take nothing thereby; for their costs; for such other and further relief as may be proper.

SNELL & WILMER,

By /s/ JAMES H. O'CONNOR,  
Attorneys for Defendants.

## Answer to Second Cause of Action

## I.

Come Now the defendants and for their first defense to plaintiff's second cause of action incorporate herein by reference their first defense to plaintiff's first cause of action.

## II.

These defendants adopt by reference their answers to paragraphs I, II, III and IV of the first



cause of action as incorporated in the second cause of action by reference.

### III.

Answering paragraph II of plaintiff's second cause of action, these defendants and each of them deny that they were in anywise willful or reckless or negligent in the premises and they and each of them further deny that any act or omission on their part was the proximate cause of any damage to the estate of the said Delphia F. Sanders, if any.

### Third Defense

These defendants and each of them allege that Delphia F. Sanders was the wife of Herbert Noah Sanders, the operator of the Hudson automobile involved in the collision; that said Herbert Noah Sanders was guilty of negligence and inattention at the time and place of the collision which caused and contributed to the fatal injuries suffered by Delphia F. Sanders and that the negligence of said Herbert Noah Sanders, being then and there the husband of said Delphia F. Sanders, is imputed to said Delphia F. Sanders and her estate.

Wherefore, having fully defended against said second cause of action, defendants pray plaintiff take nothing thereby; for their costs; for such other and further relief as may be proper.

SNELL & WILMER,

By /s/ JAMES H. O'CONNOR,

Attorneys for Defendants.

Copy mailed.

[Endorsed]: Filed March 30, 1955.

[Title of District Court and Cause.]

MINUTE ENTRY OF AUGUST 4, 1955

This case comes on regularly for trial this day. Carl Mangum, Esq., Harold Scoville, Esq., and J. Adrian Palmquist, Esq., appear for the plaintiff. Mark Wilmer, Esq., and T. J. Byrne, Esq., appear for the defendants.

Both sides announce ready for trial.

A Jury of twelve persons is now duly empaneled and sworn to try this case.

Thereupon, It Is Ordered that all Jurors not empaneled in the trial of this case be excused to Tuesday, August 9, 1955, at ten o'clock a.m.

On motion of counsel for the defendants, the Rule is invoked and the following witnesses are sworn, instructed by the Court and excluded from the Courtroom:

Gilbert Ripka (excepted)

Douglas C. Paxton

Sandra Martinez

Norma Sanders

Roy H. Bryfogle

Samuel Hurlbert

Wanda Sanders

Mrs. Fern Schulman

J. Adrian Palmquist, Esquire, states plaintiff's case to the Jury and Mark Wilmer, Esquire, makes a statement to the Jury on behalf of the defendants.

And thereupon, at 11:45 o'clock a.m., It Is Ordered that the further trial of this case be con-

tinued to two o'clock p.m. this date, to which time the Jury, being first duly admonished by the Court, is excused.

Counsel now stipulate that the defendants Gilbert Ripka and Wilson Brothers Truck Lines do not contest the issue as to agency and that the deaths were caused in the accident and as a result thereof and as a proximate result of the injuries sustained in the accident.

Counsel for plaintiff moves that the Rule on witnesses be relaxed as to minor children of deceased and that they be allowed to remain in the courtroom, and said motion is resisted by counsel for defendants and denied by the Court.

Whereupon, the parties and counsel are excused until two o'clock p.m.

Subsequently, at two o'clock p.m., the Jury and all members thereof, the parties and respective counsel being present pursuant to recess, further proceedings of trial are had as follows:

#### Plaintiff's Case:

Samuel Hurlbert, heretofore sworn, is called and examined in the plaintiff's behalf.

The following plaintiff's exhibits are now admitted in evidence:

- 1, map
- 2, photograph
- 3, map

Robert M. Fronske is now sworn and examined in the plaintiff's behalf.



Plaintiff's Exhibit 13, photograph, is now admitted in evidence.

Robert R. Harris is sworn and examined in the plaintiff's behalf.

The following plaintiff's exhibits are now admitted in evidence:

- 15, photograph
- 16, photograph
- 17, photograph
- 18, photograph
- 19, photograph
- 19a, enlargement of photograph
- 4, photograph
- 12, photograph

And thereupon, at 4:50 o'clock p.m., It Is Ordered that the further trial of this case be continued to Friday, August 5, 1955, at ten o'clock a.m., to which time the Jury, being first duly admonished by the Court, all parties and counsel are excused.

---

[Title of District Court and Cause.]

#### MINUTE ENTRY OF AUGUST 5, 1955

The Jury, and all members thereof, the parties and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

Plaintiff's Case Continued:

Plaintiff's Exhibit #21, certified copies Letters of Special Administration, is now admitted in evidence.

Glenn L. Flake is now sworn and examined in plaintiff's behalf.

Plaintiff's Exhibits 20, and 22 to 34, inclusive, each being a photograph, are now admitted in evidence.

Defendants' Exhibits A and B, each being a photograph, are now admitted in evidence.

Phillip R. Cook is now sworn and examined on behalf of the plaintiff.

Plaintiff's exhibits 9 and 10, photographs, are admitted in evidence.

And thereupon, at 11:55 o'clock a.m., It Is Ordered that the further trial of this case be continued to 1:30 o'clock p.m., this date, to which time the Jury, being first duly admonished by the Court, the parties and counsel are excused.

Subsequently, at 1:30 o'clock p.m., the Jury and all members thereof, the parties and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

Phillip R. Cook, heretofore sworn, is now recalled and further examined in the plaintiff's behalf.

Defendant's Exhibit C, Statement of Phillip R. Cook, is now admitted in evidence.

Cecil Louis Wedgworth is now sworn and examined in plaintiff's behalf.

Gilbert Ripka, heretofore sworn, is now called and cross-examined as an adverse party.

The following witnesses heretofore sworn are now called and examined in the plaintiff's behalf:

Norma Jean Sanders

Sandra Martinez

At 4:45 o'clock p.m., It Is Ordered that the further trial of this case be continued to Saturday, August 6, 1955, at 9:30 o'clock a.m., to which time the Jury, being first duly admonished by the Court, the parties and counsel are excused.

---

[Title of District Court and Cause.]

### MINUTE ENTRY OF AUGUST 6, 1955

The Jury, and all members thereof, the parties and all counsel are present pursuant to recess, and further proceedings of trial are had as follows:

#### Plaintiff's Case Continued:

The depositions of Edgar Pease, Marilyn Tulley, Mildred M. Saunders, Ellen Onstott and James Martinez are now read into evidence.

Plaintiff's Exhibit 43, snapshot, is now admitted in evidence.

The American Experience Mortality Tables in the Arizona Code 1939 as to the life expectancy of a person aged 39 and of a person aged 46 are now read into evidence.

Whereupon, the plaintiff rests.

Mark Wilmer, Esq., counsel for the defendants, now moves for a directed verdict in favor of the defendants and against the plaintiff, or in the alternative, for an order dismissing this action, and

It Is Ordered that said motion is denied.

## Defendants' Case:

Dr. Harold F. Edwards is now sworn and examined in defendants' behalf.

And thereupon, at twelve o'clock noon, It Is Ordered that the further trial of this case be continued to 1:30 o'clock p.m., this date, to which time the Jury, being first duly admonished by the Court, the parties and counsel are excused.

Subsequently, at 1:30 o'clock p.m., the Jury and all members thereof, the parties and counsel for respective parties being present pursuant to recess, further proceedings of trial are had as follows:

The following witnesses are now sworn and examined in defendants' behalf:

Hazel Cammack

Charles Cammack

Lily Mutch

Young Veasey, Sr.

Plaintiff's Exhibits 44, and 5 to 8 inclusive, being photographs, are now admitted in evidence.

It Is Ordered that Plaintiff's Exhibits 45 to 48, inclusive, marked for identification, may be withdrawn by counsel for the plaintiff.

Roy H. Bryfogle, heretofore sworn, is now examined in defendant's behalf.

Defendants' Exhibit D, metal box and contents, is now admitted in evidence.

It Is Ordered that Defendants' Exhibit F marked for identification may be withdrawn by counsel for the Defendants.

Defendants' Exhibit G, 3 photos, is admitted in evidence.

Plaintiff's Exhibit #37, photo enlargement, is now admitted in evidence.

It Is Ordered that counsel for the plaintiff be allowed to withdraw Plaintiff's Exhibit 49 for identification.

Defendants' Exhibit E, photograph, is now admitted in evidence.

Gilbert Ripka, heretofore sworn, is now called and examined in defendants' behalf.

And the defendants rest.

Both sides rest.

At 4:20 o'clock p.m., It Is Ordered that the further trial of this case be continued to Monday, August 8, 1955, at 10:30 o'clock a.m., to which time the Jury, being first duly admonished by the Court, the parties and counsel are excused.

---

[Title of District Court and Cause.]

#### MINUTE ENTRY OF AUGUST 8, 1955

At 9:00 o'clock a.m., J. Adrian Palmquist, Esq., and Harold Scoville, Esq., are present for the plaintiff. Mark Wilmer, Esq., and T. J. Byrne, Esq., are present for the defendants.

Instructions are now settled and counsel for defendants' renews defendants' motion for directed verdict, and makes offer of proof with respect to proposed testimony of witness Charles Cammack.

It Is Ordered that said motion for directed verdict is denied.

At 10:30 o'clock a.m., the jury, the parties and



counsel are present. The case is now argued to the jury by respective counsel.

At 11:45 o'clock a.m., It Is Ordered that the further trial of this case is continued to 1:00 o'clock p.m. this date, to which time the jury, being first duly admonished by the Court, the parties and counsel are excused.

Subsequently, at 1:00 o'clock p.m., the jury, parties and counsel are present and further proceedings of trial are had as follows:

The case is further argued to the jury by respective counsel. The Court instructs the jury. At 3:30 o'clock p.m., the jury retire in charge of sworn bailiff to consider their verdicts.

Subsequently, at 5:15 o'clock p.m., parties and counsel being present, the jury return into open Court and are asked if they have agreed upon verdicts. The foreman reports they have agreed and presents the following verdicts, to wit:

Civ-411

Ralph Wanek, Administrator of the Estates of Herbert Noah Sanders and Delphia F. Sanders,

Plaintiff,

Against

Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a Corporation,

Defendants.

### VERDICT

We, The Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the

issues made by the first cause of action in plaintiff's complaint and the answer thereto in favor of Ralph Wanek, Administrator of the Estate of Herbert Noah Sanders, deceased, and against defendants Gilbert Ripka and Wilson Brothers Truck Lines, a Corporation, and we do assess plaintiff's damages in the sum of \$65,000.00.

Dated: August 8, 1955.

MERLE ALLEN,  
Foreman.

Civ-411

Ralph Wanek, Administrator of the Estates of Herbert Noah Sanders and Delphia F. Sanders,

Plaintiff,

Against

Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a Corporation,

Defendants.

### VERDICT

We, The Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the issues made by the second cause of action in plaintiff's complaint and the answer thereto in favor of Ralph Wanek, Administrator of the Estate of Delphia F. Sanders, deceased, and against defendants Gilbert Ripka and Wilson Brothers Truck Lines, a

Corporation, and we do assess plaintiff's damages in the sum of \$18,750.00.

Dated: August 8, 1955.

MERLE ALLEN,  
Foreman.

The verdicts are read as recorded and no poll being desired by either side, the jury is discharged from the further consideration of this case and excused until Tuesday, August 9, 1955, at 10:00 o'clock a.m.

---

[Title of District Court and Cause.]

PLAINTIFF'S REQUESTED INSTRUCTION NO. 8

If after consideration of the evidence and in accordance with the instructions and of the law as given you by the Court, you find that the plaintiffs are entitled to recovery, it will be necessary for you to assess damages for Ralph Wanek, Administrator of the Estate of Herbert Noah Sanders, deceased, and to Ralph Wanek, as Administrator for the Estate of Delphia F. Sanders, deceased, separately. The amount of damages should be fixed at the amount of the pecuniary loss to the estate of each of those two persons. It is not necessary that any witness should have testified as to the amount of any such loss, but you should take into consideration the earning capacities, habits, character and probable length of life of the deceaseds insofar as they



appear in the evidence and fix the damages at the present value of the probable accumulations by Herbert Noah Sanders and Delphia F. Sanders during their respective lifetimes had they lived their respective allotted time according to the Mortality Table read into the evidence. The amount of the damages, if any, should be such as the jury deems fair and just under the evidence in this case.

Jones v. Weaver,  
123 Fed. (2d) 403.

Section 31-103, Arizona Code Annotated, 1939  
Arizona Binghamton Copper Co. v. Dickson,  
22 Ariz 163, 178, 195 Pac. 538.

Western Truck Lines Limited v. Berry,  
52 Ariz. 38, 48, 78 Pac. (2d) 997.

Refused: 8/8/55, Covered by Defts. 4.

/s/ JAMES A. WALSH,  
Judge.

[Endorsed]: Filed August 8, 1955.

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[Title of District Court and Cause.]

### VERDICT

We, The Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the issues made by the first cause of action in plaintiff's complaint and the answer thereto in favor of Ralph Wanek, Administrator of the Estate of Herbert

Noah Sanders, deceased, and against defendants Gilbert Ripka and Wilson Brothers Truck Lines, a Corporation, and we do assess plaintiff's damages in the sum of \$65,000.00.

Dated: August 8, 1955.

/s/ MERLE ALLEN,  
Foreman.

[Endorsed]: Filed August 8, 1955.

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[Title of District Court and Cause.]

### VERDICT

We, The Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the issues made by the second cause of action in plaintiff's complaint and the answer thereto in favor of Ralph Wanek, Administrator of the Estate of Delphia F. Sanders, deceased, and against defendants Gilbert Ripka and Wilson Brothers Truck Lines, a Corporation, and we do assess plaintiff's damages in the sum of \$18,750.00.

Dated: August 8, 1955.

/s/ MERLE ALLEN,  
Foreman.

[Endorsed]: Filed August 8, 1955.

[Title of District Court and Cause.]

MOTION FOR SUBSTITUTION OF PLAINTIFF AND FOR JUDGMENT UPON VERDICT

Comes now Ralph Wanek, Administrator of the Estates of Herbert Noah Sanders and Delphia F. Sanders, deceased, plaintiff in the above-entitled proceeding and respectfully moves the Court for orders to be made and entered herein as follows:

1. That Charles Crehore, the duly appointed, qualified and acting general administrator of the Estate of Herbert Noah Sanders, deceased, and general administrator of the Estate of Delphia F. Sanders, deceased, be substituted as the party plaintiff in the place and stead of the said Ralph Wanek, the special administrator of the estates of said decedents. That attached hereto and by reference made a part hereof are duly certified copy of the Letters of Administration issued to the said Charles Crehore in the Matter of the Estate of Herbert Noah Sanders, Deceased, Probate Cause No. 2511 by the Superior Court of the State of Arizona, in and for the County of Coconino, issued by the clerk of said court, and duly certified copy of the Letters of administration issued to the said Charles Crehore in the Matter of the Estate of Delphia F. Sanders, Deceased, Probate Cause No. 2513 by the Superior Court of the State of Arizona, in and for the County of Coconino, issued by the clerk of said Court.

2. That upon the substitution of the said Charles Crehore as such administrator of the estate of said decedent as plaintiff herein, judgment be entered upon the verdict heretofore returned in the above entitled court on the 8th day of August, 1955, in favor of the plaintiff and against the defendants in accordance with the provisions of said verdict, i.e., in favor of the plaintiff as Administrator of the Estate of Herbert Noah Sanders, deceased, in the sum of \$65,000.00, and in favor of the plaintiff as Administrator of the Estate of Delphia F. Sanders, deceased, and against the defendants in the sum of \$18,750.00, and in each instance for plaintiff's costs and disbursements herein expended.

The Motion for Substitution of the said Charles Crehore as General Administrator of the estates of said decedents is made upon the grounds and for the reason that the said Charles Crehore, by his appointment, is the successor to all the interest of present plaintiff as administrator in and to the assets of the Estates of Herbert Noah Sanders and Delphia F. Sanders, deceased, and the said Ralph Wanek, as Special Administrator is bound and obliged to surrender all of the same, including his claims herein as such administrator against said defendants, to the control of the General Administrator.

The consent of the said Charles Crehore, General Administrator of the estates of said decedents to his substitution as party plaintiff in the above entitled proceeding is attached hereto.

Rule 25, Rules of Civil Procedure.

Dated this 20th day of September, 1955.

LEWIS, ROCA, SCOVILLE &  
BEAUCHAMP,

H. KARL MANGUM, and  
J. ADRIAN PALMQUIST,

By /s/ HAROLD R. SCOVILLE,  
Attorneys for Plaintiff.

### NOTICE

To Gilbert Ripka and Wilson Brothers Truck Lines,  
Inc., and Snell & Wilmer, their attorneys of  
record:

You and Each of You will please take notice that  
we will urge the above and foregoing Motion at  
the next regular call of the motion calendar for the  
Prescott Division of the above-entitled court, or at  
such time as the court may fix for the hearing  
thereof.

Dated this 20th day of September, 1955.

LEWIS, ROCA, SCOVILLE &  
BEAUCHAMP,

H. KARL MANGUM, and  
J. ADRIAN PALMQUIST,

By /s/ HAROLD R. SCOVILLE,  
Attorneys for Plaintiff.

Copy Mailed.

[Endorsed]: Filed Sept. 20, 1955.



[Title of District Court and Cause.]

OBJECTION TO SUBSTITUTION OF PLAINTIFF AND OBJECTION TO ENTRY OF JUDGMENT UPON THE VERDICT

Comes Now defendants and object to the Substitution of Charles Crehore as Administrator of the Estate of Herbert Noah Sanders, deceased, and as Administrator of the Estate of Delphia F. Sanders, deceased, as plaintiff in the above entitled and numbered cause and to the entry of judgment in favor of said Charles Crehore as such general administrator in accordance with the verdict of the jury upon the following grounds:

1. No valid verdict has ever been returned in the above entitled cause for the reason that Ralph Wanek sued as general administrator of the estates of Herbert Noah Sanders and Delphia F. Sanders whereas in fact he was not such general administrator but a special administrator and as such special administrator had no authority to bring or maintain the action.

2. There is no showing that the affairs of said special administrator have been wound up by the probate court of the State of Arizona, and the transfer of the cause of action from the special administrator to a general administrator approved and authorized by the said probate court. The federal court is not a court of probate jurisdiction and has no authority to interfere in probate matters and order the transfer of the cause of action from

the special administrator to a general administrator, if such cause of action exists. In the absence of an appropriate order of the probate court of the State of Arizona and an appropriate transfer of the rights of the plaintiff Ralph Wanek as special administrator, the federal court has no authority to order such substitution. The record is silent as to any assignment or other transfer of the rights of said plaintiff under the verdict as returned by the jury.

Respectfully submitted,

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Defendants.

[Endorsed]: Filed October 10, 1955.

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[Title of District Court and Cause.]

#### MINUTE ENTRY OF OCTOBER 10, 1955

Plaintiff's Motion for Substitution of Plaintiff and for Judgment upon Verdict comes on regularly for hearing this day. Joseph E. McGarry, Esq., is present for the plaintiff. Mark Wilmer, Esq., is present for the defendants. Counsel for the plaintiff urges plaintiff's motion for substitution of plaintiff and for judgment upon the verdict. Counsel for the defendant states objections thereto.

It Is Ordered that plaintiff's motion for substitution of plaintiff is granted and that Charles



Crehore, General Administrator of the Estates of Herbert Noah Sanders and Delphia F. Sanders be substituted as party plaintiff in the place and stead of Ralph Wanek, the special administrator of the estates of Herbert Noah Sanders and Delphia F. Sanders, and

It Is Ordered that the Clerk enter judgment herein in favor of the plaintiff and against the defendants Ripka and Wilson Brothers Truck Lines, Inc., a corporation in accordance with the verdicts returned herein on August 8, 1955.

On motion of counsel for the defendants,

It Is Ordered that a stay of execution is granted until ten days following the termination of the motion for a new trial which counsel indicates will be made.

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[Title of District Court and Cause.]

DOCKET ENTRY—OCTOBER 10, 1955

Enter judgment in favor of the plaintiff Charles Crehore, General Administrator of the Estates of Herbert Noah Sanders & Delphia F. Sanders, and against the defendants Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, in the sum of \$65,000.00 on the issues made by the first cause of action in the plaintiff's complaint and defendants' answers thereto, and enter judgment in favor of the plaintiff Charles Crehore, general Administrator of the Estates of of Herbert Noah

Sanders & Delphia F. Sanders, and against the defendants Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, in the sum of \$18,750.00 on the issues made by the second cause of action in plaintiff's complaint and defendants' answers thereto, in accordance with the verdicts.

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[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITHSTANDING  
THE VERDICT OR IN THE ALTERNATIVE  
FOR A NEW TRIAL

Come Now defendants and move the Court for judgment notwithstanding the verdict of the jury upon the ground that the special administrator had no authority to bring or maintain the action and upon the further ground that the evidence was insufficiently definite and certain to warrant the verdict of the jury. We therefore move that the judgments entered upon the verdict of the jury be set aside and defendants' motion for a directed verdict reinstated and granted and judgment rendered for the defendants.

In the alternative, and should the foregoing motion be not granted, then defendants move the Court for an order setting aside the verdict of the jury heretofore returned herein and the judgment entered thereon in the first cause of action in the above entitled and numbered cause and likewise as a separate motion defendants move the Court that the verdict of the jury heretofore rendered herein

and the judgment entered thereon be set aside and a new trial granted as to the second cause of action upon the following grounds and for the following reasons, each of which said ground and reason is directed separately to each cause of action:

1. Errors committed by the Court in the reception of evidence objected to by the defendants.

2. Errors of law in rejecting evidence offered by defendants and objected to by plaintiff.

3. Error committed by the Court in refusing to dismiss each of said causes of action upon proof that the plaintiff therein as to each said cause of action was attempting to prosecute the same as a special administrator for the reason that such special administrator for the reason that such administrator had no lawful authority to bring or prosecute such action; failure of the Court to grant motions for directed verdict for the same reason.

4. Persistent and wilful misconduct of counsel for the plaintiff in injecting inflammatory and prejudicial matters into the record before the jury throughout the trial of the cause, whereby as a cumulative result thereof defendants were denied a fair trial.

5. The verdict in each cause of action is the result of passion, prejudice and sympathy on the part of the jury whereby defendants, and each of them, have been denied a fair trial.

6. Errors of law committed by the Court in instructions to the jury.

7. The verdicts and the judgments entered thereon are unsupported by the evidence and based upon speculation and surmise.

Respectfully submitted,

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Defendants.

## MEMORANDUM IN SUPPORT OF MOTION

Without waiving the other portions of the motion for a new trial, inasmuch as the other matters have been heretofore presented to the Court on several occasions, we will restrict the memorandum to the two points which we believe clearly warrant a new trial.

The first of these is the persistent misconduct of plaintiff's counsel, Mr. Palmquist. While it is of course true that ordinarily there must be objections to misconduct of counsel, the rule is otherwise where objection would not cure the misconduct. We have specific reference to the constant reference throughout the trial by Mr. Palmquist to the fact that he was there representing the minor children of the deceased and that he did not even know who Mr. Wanek was; his request in the presence of the jury that the children be permitted to remain in the courtroom through the trial as the real parties in interest, and numerous other remarks, inferences and statements made throughout the trial and



through the course of his argument to the jury, both his opening argument and his closing argument, including improper references to the measure of damages.

In addition, he was constantly outside the record with respect to matters which were not in evidence and in a fashion which rendered it fruitless to object or further accentuate the matter by objections.

Sadler vs. Arizona Flour Mills Company,  
121 P. 2d 412, 58 Ariz. 486.

With respect to the second point, that is, that the verdict is clearly the result of passion and prejudice, we believe the amount of the verdict is such that no conclusion other than passion and prejudice can be reached. When it is remembered that the plaintiff, Herbert Noah Sanders, was a man forty-six years old whose total accumulations consisted of approximately \$2,400 in cash, a Hudson car, household furnishings of undisclosed value, which represented the community property of himself and the other plaintiff, totalling probably at the most \$4,000, or a total of \$2,000 the property of the father and \$2,000 the property of the mother.

It is further undisputed that at the time of the accident he was unemployed, and while we must accept as true under the jury's verdict that he was returning to California in the hopes of obtaining evidence to set aside his disqualification for employment a White Sands because of suspected tubercu-

losis, the fact remains that he was unemployed and had been unemployed for some time.

The record was clear to the effect that Mrs. Sanders was without earning capacity and therefore her accumulations would be related only to such as were made by Mr. Sanders. Accordingly, we have a gross verdict of \$83,750 related to the earning capacity and ability of Mr. Sanders. Even at three per cent simple interest, this amounts to \$2,512.50 per year interest. Without compounding this as we would be entitled to do in properly figuring the present value and taking only a life expectancy of ten years, we have an additional \$25,000 to add to the verdict of \$83,750, which is a total of \$108,750.

Taking into account present day income taxes and giving account to living expenses, it is apparent the jury concluded that for the next ten years of his life, Mr. Sanders would earn in the neighborhood of \$30,000 a year, since this amount would be necessary to pay income taxes, take care of living expenses and accumulate the amount of money which the jury allowed him.

While we recognize that in proper cases the Court may order a remittitur, we do not believe that such is in order here, inasmuch as the rule is that where there are other issues involved as to which there is a serious dispute, and it is clear the verdict is the result of passion and prejudice, then it is presumed that that passion and prejudice carries over to and affects the determination of the jury with respect to the other issues involved. In this case



there was a serious dispute between the parties as to whether or not there was any liability on the part of the defendants. It was their position, testified to unequivocally by the driver Ripka, that he was on his proper side of the highway proceeding along properly when the Sanders vehicle cut across the highway and into him, and an examination of the pictures of his truck would indicate that such did in fact happen.

It is therefore respectfully submitted that the only alternative afforded under the circumstances is an order for a new trial rather than a remittitur which would not cure the error of the jury in respect to the other issue of liability.

In the case of *Brabham vs. State of Mississippi*, 96 F. 2d 210, the Fifth Circuit laid down this rule:

“We agree with appellants, too, that a new trial ought to have been granted instead of trying to ameliorate a verdict which the trial judge concluded was oppressive and amounted to an injustice. \* \* \* Verdicts made excessive by the passion and prejudice springing from indulgence, in the jury room, in such feelings, may not be cured by a remittitur, but only by a new trial. \* \* \*

\* \* \*

“\* \* \* We understand that while mere excessiveness in the amount to be awarded may be cured by a remittitur, that excessiveness which results from passion and prejudice, however

natural the resentment which arouses it, may not be so cured.”

With respect to the motion for judgment notwithstanding the verdict, we believe the law to be that a special administrator, without proper authorization contained in his order of appointment may not bring and prosecute an action for wrongful death. We have argued this point before and will not further trespass on the Court's time.

In addition, we believe that the evidence was insufficiently definite and certain to avoid a finding of liability on the part of the defendants.

Respectfully submitted,

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Defendants.

Copy received.

[Endorsed]: Filed October 18, 1955.

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[Title of District Court and Cause.]

MINUTE ENTRY OF NOVEMBER 7, 1955

Defendants' Motion for Judgment Notwithstanding the Verdict and in the Alternative for a New Trial comes on regularly for trial this day. Harold Scoville, Esq., is present for the plaintiff. Mark

Wilmer, Esq., is present for the defendants. Defendants' Motion is argued by respective counsel, submitted and taken under advisement.

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[Title of District Court and Cause.]

#### MINUTE ENTRY OF DECEMBER 16, 1955

It Is Ordered that the Defendants' Motion for Judgment Notwithstanding the Verdict is denied, and

It Is Further Ordered that the Defendants' Motion for a New Trial is denied.

(Docketed December 16, 1955.)

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[Title of District Court and Cause.]

#### NOTICE OF APPEAL

Notice Is Hereby Given that Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a Corporation, defendants in the above-entitled and numbered action hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered in the above-entitled and numbered cause on the 10th day of October, 1955, and from the order entered in the above-entitled and numbered cause on the 16th day of December, 1955, denying motion of said defendants and each of them for judgment notwithstanding the verdict and further from the order entered in the above-entitled and numbered cause

on the 16th day of December, 1955, denying the motion of said defendants for a new trial.

SNELL & WILMER,

By /s/ MARK WILMER,

By /s/ JAMES H. O'CONNOR,

Attorneys for Said Defendants.

[Endorsed]: Filed Dec. 29, 1955.

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[Title of District Court and Cause.]

#### BOND FOR COSTS ON APPEAL

We, the undersigned, Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, as principals, and Commercial Standard Insurance Company of Fort Worth Texas, a corporate surety, as surety, jointly and severally acknowledge that we and our personal representatives, successors and assigns are bound to pay to Charles Crehore, Administrator of the Estates of Herbert Noah Sanders and Delphia F. Sanders, deceased, plaintiff in the above-entitled cause the sum of Two Hundred Fifty Dollars (\$250).

The condition of this bond is that whereas the defendants, Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, have appealed to the Court of Appeals for the 9th Circuit by Notice of Appeal filed December 29, 1955, from the judgment entered in the above-entitled and numbered cause on the 10th day of October, 1955, and from the order entered in the above-entitled and numbered

cause on the 16th day of December, 1955, denying the motion of said defendants and each of them for judgment notwithstanding the verdict and further from the order entered in the above-entitled and numbered cause on the 16th day of December, 1955, denying the motion of said defendants for a new trial, if the defendants Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, shall pay all costs adjudged against them if the appeal is dismissed or the judgment affirmed, or such costs as the said appellate court may award if the judgment is modified, then this bond is to be void, but if the defendants. Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, fail to perform this condition, payment of the amount of this bond shall be due forthwith.

Dated January 9, 1956.

GILBERT RIPKA,

WILSON BROTHERS TRUCK  
LINES, INC.,

By /s/ MARK WILMER,  
Their Attorney.

[Seal] COMMERCIAL STANDARD  
INSURANCE COMPANY OF  
FORT WORTH, TEXAS,

By /s/ D. M. RANEY,  
Attorney-in-Fact.

Power of attorney attached (Commercial Standard Ins. Co., to D. M. Raney or Charles Bray).

[Endorsed]: Filed Jan. 11, 1956.



[Title of District Court and Cause.]

DESIGNATION OF CONTENTS  
OF RECORD OF APPEAL

Pursuant to Rule 75, defendants Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, hereby designate the following to constitute the transcript of record on appeal in the above-entitled cause:

1. The amended complaint of Ralph Wanek, Administrator of the Estates of Herbert Noah Sanders and Delphia F. Sanders, deceased, formerly plaintiff herein.

2. The answer to said amended complaint of Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation.

3. All minute orders entered herein, including specifically the minute order for judgment and the judgment entered thereon on October 10, 1955, and specifically the orders entered December 16, 1955, denying the motion of defendants for judgment notwithstanding the verdict and denying the motion of defendants for a new trial.

4. All exhibits, either marked for identification or offered and received in evidence.

5. All instructions requested by the plaintiff and all instructions requested by defendants.

6. Reporter's transcript of evidence and proceedings.



7. Defendants' notice of appeal heretofore filed herein.

8. This designation of contents of record on appeal.

SNELL & WILMER,

By /s/ MARK WILMER,

By /s/ JAMES H. O'CONNOR,

Attorneys for Said Defendants.

Copy received.

[Endorsed]: Filed Dec. 29, 1955.

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[Title of District Court and Cause.]

AMENDED DESIGNATION OF CONTENTS  
OF RECORD ON APPEAL

Come Now defendants Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, and designate, in addition to the matters hereinbefore designated, the Bond for Costs on Appeal, filed with the Clerk of the United States District Court for the District of Arizona on January 11, 1956.

SNELL & WILMER,

By /s/ MARK WILMER,

By /s/ JAMES H. O'CONNOR,

Attorneys for Said Defendants.

Copy mailed.

[Endorsed]: Filed Jan. 11, 1956.

[Title of District Court and Cause.]

**SUPPLEMENTAL AMENDED DESIGNATION  
OF CONTENTS OF RECORD ON APPEAL**

In addition to the matters hereinbefore designated, defendants Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, designate the following instruments:

1. Plaintiff's Motion for Substitution of Plaintiff and for Judgment on the Verdict.
2. Consent of Charles Crehore to Appointment as Party Plaintiff.
3. Defendants' Objection to said Motion and to the Entry of Judgment upon the Verdict.
4. Defendants' Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial.
5. Docket Entry of Judgment Pursuant to Order of the Court for Judgment.

**SNELL & WILMER,**

By /s/ MARK WILMER,

By /s/ JAMES H. O'CONNOR,

Attorneys for Said Defendants.

Copy mailed.

[Endorsed]. Filed Feb. 2, 1956.

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[Title of District Court and Cause.]

**ORDER**

It Is Ordered that the time for filing the record on appeal and docketing the appeal herein in the

United States Court of Appeals for the Ninth Circuit be, and it is hereby, extended to and including February 17, 1956.

Dated at Phoenix, Arizona, this 3rd day of February, 1956.

/s/ DAVE W. LING,

United States District Judge.

[Endorsed]: Filed Feb. 3, 1956.

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In the United States District Court for the  
District of Arizona  
Number Civil 411-Prescott

RALPH WANEK, Administrator of the Estates  
of Herbert Noah Sanders and Delphia F.  
Sanders, Deceased,

Plaintiff,

vs.

GILBERT RIPKA; WILSON BROTHERS  
TRUCK LINES, INC., a Corporation,

Defendants.

Appearances:

J. ADRIAN PALMQUIST;  
MANGUM AND FLICK, by  
CARL MANGUM; and  
LEWIS, ROCA, SCOVILLE AND BEAU-  
CHAMP, by  
HAROLD SCOVILLE,

For the Plaintiff.

SNELL AND WILMER, by  
MARK WILMER; and  
BYRNE AND BYRNE, by  
T. J. BYRNE,

For the Defendants.

The above-entitled case came up for trial on the 4th day of August, 1955, at Prescott, Arizona, before the Honorable James A. Walsh, Judge, and a jury, and the following proceedings were had, to wit:

The Court: The Clerk will call the names of eighteen jurors. As your names are called will you please come forward and take your seats in the box which the Bailiff will indicate.

(The jury panel was called and sworn.)

The Court: Gentlemen, the case that is about to go to trial is a civil action. I say civil action as distinguished from a criminal case. It is an action for damages brought by a Mr. Ralph Wanek, who I understand lives at Flagstaff, Arizona. He brings the action as administrator, that is the personal representative of two deceased people; one is Herbert Noah Sanders and the other is Delphia F. Sanders. Both of the Sanders, Herbert Noah and Delphia F. are deceased. In their lifetimes they were husband and wife and residents of Oakland, California. As I say, the plaintiff in the action is a man named Ralph Wanek, who brings the action on behalf of the estates of the Sanders. Mr. Wanek

is styled the plaintiff in the action, or the party who brings it; the defendants, or the parties who are sued in the action, is a man named Gilbert Ripka, who I understand is present in Court here. He is the gentleman at the end of the counsel table. I understand Mr. Ripka resides in Indiana. Mr. Ripka is one defendant and a corporation organized under the laws of Missouri, under the name of Wilson Brothers Truck Lines, Inc., a corporation, is the other defendant in the case.

The plaintiff Wanek is represented in the action by Mr. Carl Mangum, an attorney of Flagstaff. Will you rise, please, Mr. Mangum. Mr. Carl Mangum is an attorney who practices at Flagstaff. Mr. Harold Scoville, an attorney that practices at Phoenix, a member of the firm of Lewis, Roca, Scoville and Beauchamp; and Mr. J. Adrian Palmquist, an attorney that [2\*] practices at Oakland, California. Those gentlemen are the plaintiff's counsel in the case.

The defendants, Mr. Ripka and Wilson Brothers Truck Lines, Inc., are represented by Mr. Mark Wilmer. Mr. Wilmer is a member of the firm of Snell and Wilmer of Phoenix, Arizona; and the defendants are also represented by Mr. T. J. Byrne, who practices in Prescott. He is a member of the firm of Byrne and Byrne.

Now, I am not going to undertake to tell you all of the issues that may arise in the case or all the issues that may be presented to you, but I am at

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.



this time going to tell you in a general sort of way what the case is about; in other words, what the parties in the matter are contending, so you will have some understanding of the nature of the case and what it is about in the main part.

As I said, it is a suit by Ralph Wanek as administrator of the estates of Herbert Noah Sanders and Delphia F. Sanders, but it is in reality two suits. It is a suit by Ralph Wanek as administrator of the estate of Herbert Noah Sanders; that is the first cause of action in the case. And the second cause of action is a suit by Ralph Wanek as administrator of the estate of Delphia F. Sanders, deceased. So we really have two lawsuits in the case because there are two causes of action. The two lawsuits are brought by the plaintiff Wanek as administrator of these estates against the defendants Ripka and Wilson Brothers Truck Lines, Inc. In his complaint in the [3] case, in both causes of action, Wanek claims that on or about July 10 of last year, about 3 o'clock in the morning, the Sanders, the deceased husband and wife, were occupants of an automobile that was being operated on U. S. Highway 66 about seven miles west of Fagstaff. The plaintiff Wanek alleges that at that time and place the defendant Ripka was driving a truck on the same highway, and that while driving it he was an employee and agent and servant of Wilson Brothers Truck Lines, Inc.; and engaged in the course of their business. In other words, he was working for them and in the scope of his business and employment at the time of these occurrences. The plain-



tiff alleges further at that time and place Ripka so wilfully or recklessly or negligently managed the truck he was driving that he caused it to go across the white line onto the wrong side of the highway and to collide with the car in which the Sanders were passengers. And Wanek alleges further that by reason of that condition there was a collision and the Sanders were killed. He asks damages on behalf of the estates of the deceased people against Ripka and the Truck Line, Wilson Brothers Truck Line.

On the part of the defendants, Ripka and Wilson Brothers Truck Line admit at the time and place alleged, Ripka was driving the truck on the highway and he was driving it as an employee of Wilson Brothers Truck Line. But they deny that Ripka is guilty of any negligence or wrongful act or omission [4] which brought about the collision; and they deny any negligence on the part of either of the defendants was responsible for the collision or for the deaths of the deceased persons. They allege further that if the Sanders were killed in this collision, that the collision and their consequent deaths were caused or proximately contributed to by the negligence of the deceased persons themselves. The defendants contend therefore they have no liability to the plaintiff in the action and that the plaintiff should take nothing from them in the case.

Gentlemen, I have identified all the parties in the case to you and the attorneys in the case, and I have told you in a general way what the case is about. And my purpose in doing that is because now

I propose to address to you collectively certain questions, and when I have finished perhaps counsel will have some questions. And we ask that if you would answer any particular question in the affirmative, in other words, if your answer to a question would be yes, indicate that by raising your hand, because it may be the Court or counsel will want to follow up that particular question with you individually. May I say to you before I start the questions that we don't ask the questions to waste time or pry into your business or affairs, but really for the purpose of enabling the Court, counsel and yourself in ascertaining whether or not you are in a fair frame of mind that you must and should be in in order to sit in good conscience as a juror in the case. [5] That is the purpose of the questions. We ask therefore that you listen to them carefully, and, as I say, if you answer any particular question in the affirmative indicate that by raising your hand.

I will ask first if there is any prospective juror who is acquainted with the plaintiff Ralph Wanek. As I say, he lives in Flagstaff. Do any of you have any acquaintance with Ralph Wanek? Did any of you have any acquaintance with Herbert Noah Sanders in his lifetime, to your knowledge, or with Delphia F. Sanders? Are any of you acquainted with the defendant Gilbert Ripka? Is there any member of any juror's immediate family who is acquainted or was acquainted with any of the people I mentioned, that is, Mr. Wanek or the deceased Herbert Noah Sanders or the deceased Mrs. Delphia

F. Sanders, or Gilbert Ripka? Is there any juror who has ever had any business or transaction of any nature or description with the defendant Wilson Brothers Truck Lines, Inc.? Has any lawyer who is participating in the case, that is, Mr. Mangum, Mr. Scoville, Mr. Palmquist, Mr. Wilmer or Mr. Byrne, have any of those men ever been your attorney or handled any legal business for you as your attorney?

Mr. Price (A Juror): Mr. Mangum has handled some legal work for me.

The Court: Is he currently handling work for you?

Mr. Price: No, sir. [6]

The Court: How recently has he done work for you, sir?

Mr. Price: About a year ago.

The Court: And that business is completely concluded at this time?

Mr. Price: That is correct.

The Court: Do you look upon Mr. Mangum as your regular attorney?

Mr. Price: No.

The Court: In other words, the business you had with him is concluded and you don't consider him to be your regular attorney?

Mr. Price: That is right.

The Court: I will ask you, Mr. Price, if that experience with Mr. Mangum or connection with him, if that would in any manner influence you or bias you or prejudice you at all in the trial of this case if you were called on to sit in this trial?

Mr. Price: It shouldn't.

The Court: You say it shouldn't. Would you permit it to influence you at all in the trial of the case?

Mr. Price: No.

The Court: Is it your statement you would and could try the case and be just and fair to both sides and do your duty just as fully and fairly as if you had never known Mr. Mangum? [7]

Mr. Price: That is right.

The Court: And you would do that if chosen as a juror?

Mr. Price: That is right.

The Court: Was there any other prospective juror who indicated——

Mr. Hill (A juror): Mr. Wilmer's firm represents my employers. I believe Mr. Mangum has also done so at various times. Also Mr. Byrne represents the corporation of which I am an officer, not representing me personally.

The Court: Your employer has Mr. Mangum and Mr. Wilmer as its counsel?

Mr. Hill: Yes, sir.

The Court: And the corporation of which you are an officer is represented by Mr. Byrne?

Mr. Hill: That is right.

The Court: What office do you hold in that corporation?

Mr. Hill: President.

The Court: May I ask you this, Mr. Hill, in connection with your employment or in connection with your interest in the corporation do you have frequent occasions to consult with these men?



Mr. Hill: Not very frequently, no, sir.

The Court: And in the relationship none of these men is your personal attorney?

Mr. Hill: No, sir. [8]

The Court: May I ask you the same questions, Mr. Hill. Any connection that you have with these attorneys, would that in any manner influence you or bias you or prejudice you if you were called on to sit in the trial of this case?

Mr. Hill: No, sir.

The Court: Would there be any embarrassment to you in sitting in the trial of this case and then having to meet or transact business with any of these lawyers thereafter?

Mr. Hill: None at all.

The Court: I take it you also would, if you sat in the trial of this case, would render a verdict fairly and justly, based on the evidence you got from the witness stand and under the Court's instructions as to the law.

Mr. Hill: I would.

The Court: Thank you, sir. Is there any other gentleman who indicated a representation by any of the lawyers in the case?

I will ask if any of you have ever been represented or stood in the relationship of client to any members of the firms of any of these men? In other words, you may not have been a client of the men in the courtroom, but have any of you been a client or stood in the relation of client to members of their firms? Is there any juror who has a member of your immediate family—by that I mean your wife,

son or daughter—who to your knowledge has been a client or [9] represented by any of the attorneys or their firms?

Mr. Born (A member of the jury panel): My mother and father were represented by Mr. Byrne.

The Court: Would that fact, Mr. Born, in any manner influence you or bias you or prejudice you in the trial of this case?

Mr. Born: No, sir.

The Court: It wouldn't have any bearing at all on your consideration or your verdict, the fact your parents had been represented by Mr. Byrne?

Mr. Born: No, sir.

The Court: Thank you, sir.

I take it that apart from having been represented by any of these gentlemen as attorneys, some of you may have some other business or social acquaintance with one or more of the attorneys; and I will ask if there is any prospective juror who has a business or social acquaintance with any attorney in the case, apart from their representing you as counsel, do any of you have a business or social acquaintance with any of the lawyers in the case? Is there any prospective juror who knows anything about the facts or purported facts of the case? In other words, have any of you prior to coming here today and hearing the Court's brief statement about what the case is about, have any of you read anything about it or heard anything about it or in any fashion obtained any [10] information what the facts of the case are or what are purported to be the facts of the case?



Is there any prospective juror who doesn't drive an automobile? Any juror who does not drive a car? Is there any prospective juror who either now or in the past has made a livelihood in the occupation of truck driver? Have any of you ever been a truck driver?

(A member of the jury panel, Mr. Potter, raises hand.)

The Court: Is that true now, Mr. Potter, or in the past?

Mr. Potter: In the past.

The Court: How recently, sir?

Mr. Potter: Four years ago.

The Court: Were you engaged in driving trucks for a long period?

Mr. Potter: About three years.

The Court: Was that for yourself or were you employed by somebody else?

Mr. Potter: I was employed by somebody else.

The Court: What type of equipment did you handle?

Mr. Potter: Just a bobtail meat delivery truck.

The Court: It was a light truck, engaged in meat delivery?

Mr. Potter: Yes.

The Court: Is that your entire experience driving [11] trucks?

Mr. Potter: That is all.

The Court: Is there anybody else who either now or in the past has been employed as a truck driver?

(A member of the jury panel, Mr. Sexton, raises hand.)

The Court: Mr. Sexton, is that true now or has it been in the past?

Mr. Sexton: It has been in the past.

The Court: How recently, sir?

Mr. Sexton: About six or seven years ago.

The Court: Were you engaged in that employment for some period of time?

Mr. Sexton: For approximately sixty days.

The Court: That is your total experience in driving trucks?

Mr. Sexton: Yes, sir.

The Court: What type equipment did you handle?

Mr. Sexton: That was local delivery.

The Court: Light truck?

Mr. Sexton: Yes. It was for Alabam, city delivery around town.

The Court: Any other juror who has been employed as a truck driver? Is there any prospective juror who either now or in the past has managed or operated a trucking line?

Mr. Allen: We operate our own trucks. We have eight [12] trucks on the highway.

The Court: That is not the trucking business? What is your regular business, Mr. Allen?

Mr. Allen: Wholesale grocery. We do run a big truck from the Coast, San Francisco and Los Angeles to Prescott regularly.

The Court: In other words, you haul your own merchandise?

Mr. Allen: To a great extent.

The Court: Is that your only experience in trucking?

Mr. Allen: Yes, sir.

The Court: And that has been true in connection with your wholesale grocery business?

Mr. Allen: Yes.

The Court: Was there any other juror that indicated——

Mr. Price: I have a similar setup that Mr. Allen has, only mine is wholesale business.

The Court: Is there anybody else in the trucking business or managed or operated a truck line? Is there any prospective juror who has a feeling of bias or prejudice one way or the other about cases of this type, that is, actions for damages growing out of motor vehicle accidents? Is there anyone at this time that has a bias or prejudice one way or the other about cases of that type, or do any of you have a bias or prejudice one way or the other about damage suits [13] generally, whether they are growing out of a motor vehicle accident or not? Is there any prospective juror that has ever been a claimant for damages against somebody else for damages growing out of a motor vehicle accident? Any of you claimed damages against somebody else?

Mr. Stoop (A member of the jury panel): About eight or nine years ago we had a damage suit, but that wouldn't affect anything but what I can render——

The Court: A fair verdict?

Mr. Stoop: —a fair verdict.

The Court: Were you the one that claimed the damages, Mr. Stoop?

Mr. Stoop: My wife.

The Court: Did you actually go to trial with it or was it settled?

Mr. Stoop: It was settled through Federal Court.

The Court: I understand you to say that experience wouldn't in any manner influence you or affect you at all if you were chosen as a juror to try this case?

Mr. Stoop: No.

The Court: Was there any other juror who indicated he had been a claimant for damages against somebody else, growing out of an automobile accident; or has any member of the juror's immediate family, other than Mr. Stoop, who indicated his wife had been, is there any member, immediate member of a juror's [14] family that has had any injuries grow out of an automobile accident; or any juror other than Mr. Stoop that has ever been a claimant for damages for personal injuries sustained in any fashion, whether in an automobile accident or not? Has any juror ever had a claim for damages made against him for damages claimed to have arisen out of an automobile accident? In other words, have you been the person against whom the claim for damages was presented? Or has any of you ever been the person against whom a claim for damages growing out of any type of accident has been presented?

I take it you gentlemen all understand from your

previous service here that at the end of every jury trial after the evidence is in and after counsel have argued the case to you that the Court then instructs you as to the law you will apply in your deliberations. In other words, gentlemen, you understand that in a jury case the jury and only the jury finds the facts of the case. The jury hears the witnesses, considers the exhibits, takes all of the testimony into account and the jury determines what the facts are, what actually happened. Then the jury in arriving at a verdict applies to those facts as they find them the law as the Court gives the jury in the instructions. And it is a juror's duty in sitting in a case of this type or any jury case to take the instructions as the Court lays them down. In other words, the jury must apply in consultation the law as the Court gives it in [15] the instructions. Is there any juror who feels he would not or could not accept and carry out that obligation if he were chosen as a juror to try this case?

Does any juror know any reason whatever, whether I have adverted to it or not, any reason whatever why he could not if he sat in this case be fair to both sides in the case, be fair to the plaintiff and be fair to the defendants, and base his verdict solely and exclusively on the evidence as it came from the witness stand and on the Court's instructions as to the law?

Counsel may examine.

Mr. Palmquist: Individually or collectively?

The Court: Collectively, please.

Mr. Palmquist: Gentlemen, when I address



these questions I would like to have you consider I am talking individually to each one of you; and if anyone feels they should speak up and answer I would appreciate your holding up your hand.

The first question I would like to ask is, and I am sure I don't have to ask it, is there anyone here that would be so provincial they would have any prejudice against any party because he happens to be from out of Arizona, or the people that were involved happened to be from California and some others from some other state? And I say I am sure I don't have to ask that question in this day and age when the [16] remotest part of the world is only sixty hours from Prescott. If there is anyone that has that prejudice I would like to have you raise your hand.

Gentlemen, this case started with the loss of lives and has resolved itself into a question of money, dollars and cents; and this is what this lawsuit is all about. You will be told sometime during the progress of this trial, and I will bring it out now, that for the loss of the husband and father involved is a prayer of \$150,000. The estate brings that claim. In the case of the wife and mother there is a prayer of \$75,000; and I will stipulate with all of you that is a lot of money. But my question right now is this: Is there anyone that has any prejudice, that just based on dollars and cents or an amount of money alone, that just the mere mention of those sums of money, that kind of money, so inflames you you couldn't sit and listen to the evidence with an open mind and a fair heart? I take it then that by



your silence, by your failure to raise hands there isn't a man sitting on this jury that if by the evidence and the common sense and by the law as His Honor will give it to you, in a matter of life expectancy and arithmetic that if we can prove to you that the estates in this case are entitled to those kind of verdicts, that there isn't a man here that would hesitate to bring in that verdict simply because of the amount of money in and of itself? [17]

I would also like to know if there is anyone on this jury that interprets the word "reasonable" to mean cheap or inadequate? I take it by your failure to raise your hands, you would consider "reasonable" to include fairness and adequacy.

I would like to know whether or not any of you gentlemen would find any difficulty in interpreting into dollars and cents, projecting yourself into the future of a deceased's life, and following his Honor's instructions as to the character and habits, health and earning capacity of a decedent; and to interpret such human values into property values or to come up with a dollar and cents verdict, the only kind of verdict that can be rendered, if one is returned, for the loss of these lives. Is there anyone here that would find that repulsive for any reason, or repugnant, or that would feel they couldn't be fair as appraisors of such valuation, in rendering a decision in this court? I take it by your silence, gentlemen, you feel you could follow such.

I would also like to know if there is anyone here who feels that they would be inclined to try the

respective lawyers, rather than the case. I am sure I don't have to ask that question; but sometimes I find I am on trial, rather than the case I am representing. I take it you gentlemen will try the case.

I would also like to know if there is anyone here that [18] feels that he would be unable to bring his common sense into the jury room with him, and exercise his common sense, in appraising physical evidence, as opposed, say, to some opinions that might be brought in verbally. I take it, gentlemen, that based on your failure to raise your hands, and on these questions I have asked, you can be absolutely fair and just to both sides in this case.

There is just one other question I would like to ask you collectively. Is there anyone here who is, because of a philosophy, sometimes called a fatalistic philosophy, or because of some religious belief, or because of their way of thinking, that believes in what is called the inevitability of accidents, that these things have just got to happen, that there is no way of avoiding them? Such a doctrine excludes courtesy on the highway, and excludes a safe and sane driver. Is there anyone that subscribes to this doctrine—we will call it the inevitability of accidents? I take it by your failure to raise your hands, that all of you agree that accidents can be prevented by safe and sane driving.

Is there anyone here that feels that a person who is a wrongdoer in an accident should not be held accountable under the law? I take it your answer to that is that you feel he should be accountable.

Involved in this, by the way, is a corporation. I

understand some of you men are corporation men. Is there [19] anyone here who feels the law is wrong or unfair, in holding a principal or a master responsible for the acts of his agent or employee or servant? I take it by your failure to raise your hands, that you feel that is a fair law and will follow it.

If your Honor please, there was one individual question that I had respecting Mr. Hill. Could I ask that of Mr. Hill?

The Court: You may question Mr. Hill.

Mr. Palmquist: Thank you, your Honor. Mr. Hill, I am not singling you out, but I notice you said you are president of a corporation.

Mr. Hill: That's right, sir.

Mr. Palmquist: I am new in this country, but will you tell me what corporation that is?

Mr. Hill: Prescott Industrial Foundation.

Mr. Palmquist: Was there another company?

Mr. Hill: No. I mentioned Mr. Wilmer's firm representing my employer.

Mr. Palmquist: Who are your employers?

Mr. Hill: Arizona Public Service Company.

Mr. Palmquist: Is that the power company?

Mr. Hill: Yes, sir.

Mr. Palmquist: In what capacity are you with the power company?

Mr. Hill: Sales manager. [20]

Mr. Palmquist: Do you ever have anything to do with claims or injuries, presented to the power company as such, or ever have to get into a huddle with Mr. Wilmer, as such, on these things?

Mr. Hill: On rare occasions; not very often.

Mr. Palmquist: I don't know how to interpret your answer. When was the last time you were in such a huddle? I had in mind there was such an action just a short time ago, involving a death. Were you involved in that? Mr. Wilmer defended the action?

Mr. Hill: No, sir.

Mr. Wilmer: I have no recollection of any such action as Mr. Palmquist speaks of.

Mr. Palmquist: You are certain now—suppose you were in the position of my clients, would you be willing to let twelve, Mr. Hill, with your background—I have to rely on you on this now—sit and hear your case; twelve people of the same frame of mind and same background that you have?

Mr. Hill: I think I could be very fair about it.

Mr. Palmquist: If you found you had to return a verdict against Mr. Wilmer; that wouldn't cause you any embarrassment, as such?

Mr. Hill: No, sir.

Mr. Palmquist: You believe there should be equal and exact law for the small as well as the large? [21]

Mr. Hill: That is right.

Mr. Palmquist: Justice for all, regardless of their size, race color or religion?

Mr. Hill: I have no prejudice in the matter.

Mr. Palmquist: Thank you very much. I have no further questions.

Mr. Wilmer: Gentlemen, I am quite sure that



Mr. Palmquist didn't mean to mislead you; but I take it you all understand there is the issue of liability in this case, before the first one can be resolved—before we get into this question of damages. I want to ask you just one or two questions on that. Are there any of you gentlemen who feel you would be influenced in any degree in arriving at your verdict through sympathy? I mean by that, are any of you of the frame of mind, that you would feel that because two people had been killed, unfortunately in an automobile accident, that at some phase it would only be right to give their estate something, even though you might feel, in your hearts, the people who were killed had brought on their own deaths? I ask that question. I know we are all human; and I would like to know if any of you feel you would let consideration of those things turn you from reaching a conclusion you felt in your own good conscience you should reach? I take it from the silence of all of you, that in the event you are chosen as jurors, this case will be weighed abstractly and impartially and the [22] conclusion you reach will be that, which you believe, under the facts as you find them, and the law the Court gives you, is the conclusion you should reach.

We have no further questions.

Mr. Palmquist: If your Honor please, there is one question I feel I must ask, in view of the question he asked. Can I ask one more?

The Court: You may ask one question.

Mr. Palmquist: Thank you. Gentlemen, I would just like to know if there is anyone here who feels

the reason I am over here from California, or this lawsuit has been brought, is because of this thing that was called sympathy. My experience has been, there are two types of sympathy——

Mr. Wilmer: If it please the Court, I have been very lenient with counsel. I object to any further conduct of that course.

The Court: Counsel is now making a statement. If you want to stop with the question that you asked.

Mr. Palmquist: I meant to lay foundation, if your Honor please, for the question that has been asked. I think I can get at it this way. Gentlemen, sympathy is a two-edged sword. You can feel just as sorry for a person that owes a bill and doesn't want to pay it, as a person that is trying to collect the bill. Is there anyone that would allow any of that kind of sympathy in the case? That was my question. [23] I take it that the failure to raise your hands, you are not going to allow any of those kinds of emotions to enter.

We have no further questions.

The Court: Give the list to counsel.

(Jury list handed to counsel.)

The Court: In just a moment, Gentlemen, the clerk will call out the names of the twelve jurors who will sit in the trial of the case. As your names are called will you please stand and remain standing until you have taken the oath.

(Jury called and sworn.)

The Court: The jurors in the box who are not



going to sit in the case will retire to the body of the courtroom, please.

You may proceed with your statement.

Mr. Wilmer: Before proceeding with the statement I would like to invoke the rule.

The Court: Very well. All witnesses in this case will please come to the clerk's desk.

Mr. Palmquist: Does that include the daughters, who will be witnesses?

The Court: They should come up and be sworn.

Mr. Scoville: We have witnesses who have been asked to report in the afternoon and who are not here.

Mr. Wilmer: We are in the same position, your Honor, [24] but these witnesses will be kept out of the courtroom.

The Court: Counsel will have the obligation of keeping all witnesses out of the courtroom, who have not been sworn.

(Witnesses sworn.)

The Court: What is known as the rule, has been invoked; and that means that all witnesses in the case other than the parties must remain outside the courtroom at all times when testimony is being taken in the case. It means also that while you are outside and while you are waiting to testify, you are not to discuss with anybody other than the counsel, the lawyers in the case, the testimony you are going to give. It means further that after you have testified and after you have retired again from the courtroom, you are not to discuss with anyone

other than counsel, the testimony you have given. In other words, you are not to discuss your testimony in the case, with anybody other than counsel, either while you are waiting to testify or after you have testified. The bailiff will find places for you outside the courtroom, and you will be called in as you are needed.

You may proceed.

(Opening statement by counsel for plaintiff.)

(Opening statement by counsel for the defendants.)

The Court: Gentlemen of the jury, it is almost noon; so, at this time, we will take the customary recess until 2:00 o'clock this afternoon. Please be back promptly at [25] that time. And during the recess, and all recesses and adjournments throughout the trial, don't discuss the case among yourselves or with anybody else; and don't make up your minds about the case until it is finally submitted to you for your deliberation to begin. Those are important admonitions. In other words, don't discuss the case among yourselves or with anybody else and don't make up your minds until the case is finally submitted to you for your deliberation to begin. You can appreciate that the evidence will come in, in stages; you can't know the whole case until all the evidence is in. And, even when all the evidence is in, you haven't had the benefit of arguments of counsel or the Court's instructions. You can see how improper and wrong it would be to try

to come to a conclusion in the case before it is submitted to you for your deliberations to begin. With those admonitions which I ask you to bear in mind throughout the trial, we will stand at recess until 2:00 o'clock.

(Jury retires from the courtroom.)

The Court: Let the record show the jury is now entirely withdrawn from the courtroom. Does counsel have some stipulation?

Mr. Wilmer: Yes, your Honor, with respect to the issues made by the pleadings, the defendant, Ripka, and the defendant, Wilson Brothers Trucking Company, does not contest the issue, first, as to agency. In other words, we admit, at [26] the time of the accident, the defendant, Ripka, was an employee of Wilson Brothers Trucking Company, acting within the scope and course of his employment. Two: with respect to the question of the causation of the two deceased persons, we concede that their death was caused in the accident and as a result of the accident. Is that sufficient? And as a proximate result of the injuries sustained in the accident.

Mr. Palmquist: I do wish to reserve, however, the right to comment on the lateness of the stipulation as to agency.

Mr. Wilmer: We can meet that issue, if counsel desires to do so.

Mr. Palmquist: There is just one thing I would like to ask, if your Honor please. I have these daughters of the family with me. They are very much concerned in learning what happened. They

are actual witnesses to the accident, in that they were in the car, but they do not know what happened. They will not be eyewitnesses as such. I don't know, I am in a foreign country here. In my country we would allow them to stay in the courtroom. They are the real parties in evidence. I don't even know who this Wanek is; but my Arizona friends and associates tell me that is the only way the action could have been brought. In our country we could have brought it in the names of the daughters, as heirs of the estate. They are the real parties in interest. [27]

The Court: In our practice, when the rule is invoked, I exclude everybody but the parties. In the case of a party who is represented, such as a corporation or deceased's estate, I permit them one of the officers of the corporation or administrator or executor to be present.

Mr. Palmquist: To me it seems cruel, because Mr. Ripka is sitting here; and they are the daughters, they merely want to hear the testimony. The only thing they will have anything to testify about will be the damage question.

The Court: I suppose, Mr. Palmquist, you could argue——

Mr. Palmquist: Will you stipulate to that, Mr. Wilmer?

Mr. Wilmer: It is my position, if it please the Court, the mere parading of the minor children in the courtroom, unless they have some substantial testimony to offer with respect to the issues is preju-



dicial under the rule laid down in the case of Western Truck Lines vs. Barry.

The Court: We have that case in the State Court. However, if you are going to have the rule you can have it. If the Court goes to making exceptions in every case on this reason and that reason, pretty soon the Court is doing nothing but settling things like that. I follow the practice of having the rule and if counsel want to stipulate, that is all right, but in the absence of that, I will apply it to both sides.

Mr. Palmquist: Well, I beseech counsel to stipulate—[28]

Mr. Wilmer: I will not stipulate to something I consider to be prejudicial error in our jurisdiction, Mr. Palmquist.

Might I ask the Court, simply for the purpose of avoiding gilding the lily—I know it is your Honor's custom—I have been told it is your Honor's custom to largely prepare your own instructions, or at least that you have a set of stock instructions which, if you find nothing new in counsel's instructions, you follow.

The Court: I prepare all the stock instructions. Basically I use the California jury instructions to outline the issues and so on. If counsel has anything special——

Mr. Wilmer: I was interested, primarily, in the stock instruction your Honor gives on contributory negligence.

Mr. Scoville: Prior to Mr. Wilmer's arrival this morning, Judge Walsh asked me if I had in-

structions, which I submitted. I have a copy for you too. Do you have some?

Mr. Wilmer. I have not prepared them.

Mr. Palmquist: We will exchange instructions with you when you have them.

Mr. Wilmer: Might I inquire of the Court, if the Court has a stock instruction on wrongful death action?

Mr. Scoville: I just lifted the one out of the Ninth Circuit, almost word for word.

The Court: Jones against Weaver case in the Ninth [29] Circuit.

Mr. Scoville: It is two deaths, just an identical situation.

The Court: I have given that one with the definition of present value of probable accumulations of the decedent.

Mr. Wilmer: That was what I was concerned with, your Honor, because there had been some variation in the State Court with respect to the instruction. I was interested in knowing whether I should prepare one.

The Court: If you will look at the last one of counsel's I will give it plus a definition of present value of the probable accumulations of the decedents.

Mr. Wilmer: Since counsel has refused to supply me with a copy——

Mr. Palmquist: We haven't refused. We are merely asking what we are entitled to, a copy of your instructions; then we will give you a copy of ours. That is all. No one has refused anything.



Mr. Wilmer: Counsel must have misunderstood me. I was inquiring of the Court——

Mr. Palmquist: You stated to the Court we refused to give you instructions; that is not so. We want to exchange instructions.

Mr. Wilmer: I was asking the Court with respect to what instruction he proposed to give; the Court says that he [30] proposed to give a particular instruction which was submitted. I then said I hadn't had an opportunity to see it.

The Court: Jones against Weaver is in 123 Fed. 2d. at 403. As I recall, the instruction there is——

Mr. Scoville: I had lifted it almost verbatim out of that case.

The Court: Before we take up this afternoon, I will read to counsel—I take it there will be no actuarial testimony?

Mr. Scoville: We only propose to offer the mortality tables.

The Court: I will read the instruction I propose to give, where there is no actuarial testimony, and you can see if you want to worry with something else.

Mr. Scoville: Very well, your Honor.

(Whereupon, a recess was taken at 12:00 o'clock, until 2:00 o'clock p.m.)

SAMUEL HURLBERT

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Scoville:

Q. State your name for the Court and jury, please. A. Samuel Hurlbert. [31]

Q. Mr. Hurlbert, where do you reside?

A. Phoenix, Arizona.

Q. What is your occupation?

A. I am a civil engineer.

Q. Are you presently employed in that capacity as a civil engineer? A. Yes.

Q. And by whom are you employed?

A. Arizona Highway Department.

Q. The highway department of the state of Arizona? A. Yes.

Q. And you are employed in the capacity as civil engineer? A. Titled as designer.

Q. Designer? A. Yes.

Q. That is engineering design of roads and highways? A. Yes.

Q. Now, how long have you been engaged in the profession of civil engineering?

A. About—well, I have been in engineering work twenty-four years and highway work nineteen.

Q. And highway work nineteen years?

A. Yes.

Q. In some engineering capacity?

A. Yes, sir. [32]

(Testimony of Samuel Hurlbert.)

Q. You have some education in engineering?

A. Yes. I have a bachelor of science degree in engineering from the University of Nebraska.

Q. Since your graduation from college with your degree in engineering have you continuously practiced your profession in that regard?

A. Yes; continuously.

Q. Are you a registered civil engineer under the laws of the state of Arizona? A. Yes.

Q. How long have you been such registered civil engineer? A. Two years.

Q. Now, Mr. Hurlbert, at my request did you go within some time recently, I believe it was, to the area of U. S. Highway 66 at a point thereon approximately seven and one-half miles west of Flagstaff? A. Yes.

Q. At my direction, what did you do there?

A. I went up there and made certain the road was as designated on the plans of the Arizona Highway Department.

Q. You made a personal survey of the road?

A. Yes.

Q. And checked the accuracy of some maps or plans?

A. Yes. I checked the data up there on the ground.

Q. Subsequently, did you prepare for me a map or plat of [33] area of U. S. Highway 66?

A. Yes.

Mr. Scoville: May this be marked for identification?

(Testimony of Samuel Hurlbert.)

(Plaintiff's Exhibit 1 marked for identification.)

Q. (By Mr. Scoville): Mr. Hurlbert, referring to what has been marked Plaintiff's Exhibit 1 for identification, what is this instrument?

A. Well, this is the plan and profile of the area with all the engineering *data* concerning the construction of the highway as it now stands and as it has been since the year 1945.

Q. Now, you actually did your survey work there approximately when on the road?

A. On July 23rd.

Q. Of 1955? A. Yes; 1955.

Q. Now, do I understand from you that since the construction of that highway in 1945 there have been no changes in the roadbed or the structure of the highway itself with reference to its course and direction, elevation?

A. No. There has been no changes.

Q. There have been no changes. Then have you platted upon this exhibit, Plaintiff's Exhibit 1 for identification, the roadway in fact as it existed at the time of your survey and of the time of the preparation of this plat? A. Yes. [34]

Q. Did you check the various elevations?

A. Yes.

Q. Of the various points of the highway?

A. Yes.

Q. Is this to the best of your ability, in view of your years of education and years as a civil engin-

(Testimony of Samuel Hurlbert.)

eer, a true and accurate plat of the physical conditions with reference to the roadway on U. S. 66 at a point approximately seven and one-half miles west of Flagstaff, Arizona?      A. Yes.

Mr. Scoville: We offer Plaintiff's Exhibit 1 for identification.

Mr. Wilmer: If the Court will pardon me just a moment.

We have no objection.

The Court: It may be received.

(Plaintiff's exhibit 1 marked in evidence.)

Mr. Scoville: The map having been received in evidence, with the Court's permission I would like to affix it to the board so that the witness might explain it. Can you see that? If you can't we will appreciate it if you will speak up.

Q. (By Mr. Scoville): Mr. Hurlbert, you have designated a section at the top of the map—what are the directions first of all to have been used in the layout, the usual map directions?

A. Yes. The north arrow thereon—

Q. Speak up so this last gentleman can hear [35] you.

A. The north arrow indicates the north; of course north, south, east and west (indicating).

Q. Now, to the east of this area you have labeled, "to Flagstaff," is that correct?

A. Yes.

Q. First of all, will you tell us or will you indicate and point to the jury the center line of the



(Testimony of Samuel Hurlbert.)

highway, if you have so indicated it at that point?

A. This is the center line of the highway here as indicated, an arrow pointing to this heavy line down the center.

Q. That with the two lines on either side of it is the highway?      A. Yes.

Q. Now, of what is the center section of that highway composed, what is its construction?

A. The center section, this is a typical section taken on the curve proper here and it shows the center section of the roadway as twenty-two feet of concrete. In other words, concrete paving of twenty-two feet wide, eleven feet each side of center line. This road also has eight-foot mixed bituminous surfacing shoulders. They are eight feet wide. That makes a complete roadway of thirty-eight feet; and that would be nineteen feet each side of center line.

Q. Now, with reference to the eleven feet on each side of center line of the concrete, that is of what color, general color? [36]

A. That is a white color.

Q. And the bituminous is black?

A. The bituminous is generally black.

Q. You have indicated that the road—you have depicted here the curve and the road as it appears here?      A. Yes.

Q. The curve on the highway is as depicted on your map?

A. Yes. This section here is a section taken on

(Testimony of Samuel Hurlbert.)

the curve. The curve begins here where you see this designation "T.S." and comes fully into the curve at the "S.C." This is what is called a spiral, that is an easement curve that eases the vehicle into the main curve. When you strike at this point you are into the main curve and you come into this super elevation, and from there on you are on the super elevation of the curve.

Q. The curve, you say, of the super elevation commences at the point you have designated as "S.C. 18"—

A. 27 plus 33.98. These designations are what we call engineering stations, and an engineering station is one hundred feet. So that the distance between here and this next mark here is one hundred feet. This is station 1822, 1824, 1825. That is used all over the country in designating distances on roadway plats.

Q. Now, you have also indicated some dash, dotted lines. What do these indicate? [37]

A. Those are right-of-way lines showing the right of way that belongs to the state of Arizona for the filling of the road.

Q. Now, below the highway you showed lines that you have labeled "Atchison, Topeka and Santa Fe Railroad." That is railroad tracks for the railroad right of way?

A. Yes. That indicates railroad tracks. This is the railroad and railroad right of way.

Q. And the Santa Fe tracks do adjoin this curve to the south, is that right? A. Yes.

(Testimony of Samuel Hurlbert.)

Q. Incidentally, what is the scale at which the top portion of the plat is drawn or highway or highway and of that curve?

A. This scale is one inch equals fifty feet.

Q. Approximately how many feet of highway, can you tell us offhand, is involved in the over-all curve?

A. In the over-all curve from here?

Q. The entire part of the road depicted.

A. The entire part of the map shown there?

Q. Approximately what?

A. Twenty-two hundred feet.

Q. Twenty-two hundred feet?

A. Thirty-seven and twenty-two—that would be seventeen hundred feet. It is fifteen hundred. Fifteen hundred feet [38] shown there.

Q. How much?

A. Fifteen hundred feet of the highway is shown there.

Q. Included in that drawing?

A. Yes.

Q. You have shown at approximately the middle of the plat, crossing the highway at right angles, some dotted lines and you have labeled them. Would you put your ruler on that point?

A. Right here?

Q. Yes. What is that, Mr. Hurlbert?

A. That is a concrete arch culvert. That is located at Station 1829 plus fifty. In other words, it is halfway between the two engineering stations.

Q. When you say concrete arch culvert, that is a culvert under the road for passage of water, is that right?

A. Yes.

(Testimony of Samuel Hurlbert.)

Q. Drainage? A. Yes.

Q. That culvert, you have to the right of the culvert, if I might point, on the north side a series of small dots look to be about fifty feet apart, or circles. You have one, two, three, four, five, six, seven, eight, nine and so on; and five on the north side. A. Yes.

Q. What are those little circles, what do they indicate? [39]

A. Those are guide posts which you see along the edge of the highway on curves and structures. And in this case they were white posts and they were located every fifty feet.

Q. Now, leave that plat for a moment. Have you explained rather fully what you have depicted on the top portion of the plat, is there something I have overlooked that is not explained?

A. I don't believe so.

Q. All right then, let me direct your attention to the figures before we go to the bottom of the plat, "Highway Curve," and there are a lot of figures there and numbers there. A. Yes.

Q. Are those the engineering facts with reference to the curve? A. Yes.

Q. What do they mean, briefly?

A. That is engineering data that tells you how to lay in the curve for construction purposes.

Q. You found the curve to be laid in that way?

A. Yes. One of the most important things is the curvature here. I went up there and checked it, and also checked all these reference points. And there



(Testimony of Samuel Hurlbert.)

are breast caps and markers out to the side and there are breast caps imbedded in the pavement here at different places which tell you the road was constructed as per plan shown. [40]

Q. Let me direct your attention to the bottom half of the map. You have drawn a line on a scale?

A. Yes.

Q. Will you explain to the jurors and Court what that line represents?

A. That line here is the elevation—is the line of the elevation of the center line of the roadway. And you can see here that the designation here is level; that means this designation here from the center line of the roadway is all the same elevation. In other words, it is completely level just like the top of that. That doesn't mean when you get over into here, 1831, you are well into the curve, you are way over on the curve. That doesn't mean—that doesn't give any indications of the edges of the road——

Q. Could I interrupt you? This doesn't give an indication of the bank of the curve?

A. That is right.

Q. Just the center line?

A. That is right.

Q. Elevation of the center line all the way through?

A. Yes; that is right. Now, this is station 1831, that is right here. At that point you began to rise and begin to come into this grade and you enter just about on this grade here about the end. And this is a vertical curve which eases you from one



(Testimony of Samuel Hurlbert.)

elevation into the next elevation, in other words, to [41] the rise.

Q. All right, if you will be seated for a moment.

(Plaintiff's Exhibit 2 marked for identification.)

Now, if I understand your testimony correctly, Mr. Hurlbert, what we have here, if we are traveling in an easterly direction—in a westerly direction rather—if we are traveling in a westerly direction from Flagstaff on this road we come downhill and a curve to our left, is that right?

A. That is right.

Q. We come downhill and a curve to your left?

A. Yes.

Q. If you are traveling away from Flagstaff going west.

A. If you are coming down the hill, yes, your curve would be to your left.

Q. You are coming downhill, and to your left.

A. Yes.

Q. If you are going toward Flagstaff or east then your curve is to the right? A. Yes.

Q. And on the flat here is the center line and begins to climb and gets down past the point which has been indicated here? A. Yes.

Q. I show you what has been marked Plaintiff's Exhibit 2 [42] for identification and ask you to look at that photograph for a moment. A. Yes.

Q. Do you recognize that picture? A. Yes.

Q. Of what is it a picture?

(Testimony of Samuel Hurlbert.)

A. It is a picture looking—it is a picture taken from this direction looking up the road.

Q. And do you recognize that picture as a true and accurate reproduction of the highway at that point and place and covering substantially the area represented by the plat?      A. Yes.

Q. And did it so appear at the time you made this plat?      A. Yes.

Mr. Scoville: We offer 2.

Mr. Wilmer: May I ask a question, please?

The Court: Surely.

Mr. Wilmer: Is this taken looking east or west, Mr. Hurlbert?

The Witness: That picture is taken looking east. It was taken from that direction looking this way on the map. In other words, toward Flagstaff. Here is your designation "To Flagstaff."

Q. (By Mr. Wilmer): Do I understand you to say, Mr. Hurlbert, that if I were standing at this end of the plat looking [43] east I would see a flat, level piece of road, then I would see a hill going up?

A. Yes.

Q. That is right?      A. Yes.

Q. You say that accurately shows a flat piece of road and hill ascending without a change?

A. Yes, that shows a flat area here with a hill rising.

Q. It doesn't show to the eye at least, a flat road and then a dip and then a slight rise?

A. No.

Mr. Wilmer: If it please the Court, the witness

(Testimony of Samuel Hurlbert.)

has testified it is accurate and shows what the plat shows. As far as we are concerned I don't think it makes any difference, but plainly it doesn't show what we get right there.

Mr. Palmquist: If counsel is going to testify he should be sworn, your Honor.

Mr. Scoville: The witness testified, and I think what is perhaps confusing Mr. Wilmer, in the center line of the road it is level and on the outside there is a bank. I grant with counsel the perspective on this may look somewhat different than the engineering to our eye, it sometimes looks a little different, but he has testified this is the way the road looks when you look at it.

Mr. Wilmer: I think it is wasting our time and the [44] jury's time. They can look at it.

Mr. Scoville: Do you have any objection?

Mr. Wilmer: I object to it that it is not an accurate depiction of what the witness has testified that map shows.

The Court: It may be received.

(Plaintiff's Exhibit 2 marked in evidence.)

Q. (By Mr. Scoville): Referring to Plaintiff's Exhibit 2 in evidence, there is some question that has been raised whether there is a dip in the road. Would you care to explain whether or not you see any dip?

Mr. Wilmer: If it please the Court, the exhibit speaks for itself. The jury are perfectly competent to look at the picture to determine whether they

(Testimony of Samuel Hurlbert.)

see a dip in it or not. Whether the witness sees a dip in it, the picture speaks for itself and should be submitted to the jury for their examination.

Mr. Scoville: May I ask the witness to explain his testimony with reference to the map and picture; and I want to simply ask him with reference to the area appearing on his plat as level at the center line of the highway shown at the back of this picture, whether or not in the picture it appears to take a dip, and ask him whether or not he has any explanation of that as an engineer.

A. Well, sometimes——

Mr. Wilmer: Just a moment. I don't like to be constantly [45] arguing, your Honor, but if it appears to make a dip and there isn't any dip it isn't an accurate picture.

The Court: The objection will be sustained. As to what the picture shows, the witness can state that.

Q. (By Mr. Scoville): On the basis as to what the picture shows, there is apparently a vehicle on this road. Whereabouts would that vehicle be on the plat? Can you point it out to us?

A. It appears to be approximately down in here somewhere, as near as I can tell. It looks to be right in here (indicating).

Q. All I am trying to get from you are the facts, Mr. Hurlbert, that is whether or not there is a decline in the elevation at the center line of the highway at that point, actually is there?



(Testimony of Samuel Hurlbert.)

Mr. Wilmer: If it please the Court, I have objected, the Court has sustained it. Either that is a correct depiction of the highway as it appears from that plat or it is not. It isn't up to this witness to weigh why it isn't accurate.

Mr. Palmquist: No; we confess no inaccuracy at all, none at all.

Mr. Wilmer: I ask the Court to look at it then. It is for the jury to look at that picture and see if it is accurate. It isn't for this witness to reconcile the picture [46] to the plat.

(The last question was read.)

The Court: He may answer that question.

The Witness: There is no decline or dip at that point.

Mr. Scoville: May I let the jury examine the exhibit?

Mr. Wilmer: We have no objection to that, your Honor.

Q. (By Mr. Scoville): Now, Mr. Hurlbert, at my request you also prepared an additional plat, did you not? A. Yes.

Q. Was that plat prepared of the same area?

A. Yes.

(Plaintiff's Exhibit 3 marked for identification.)

Q. (By Mr. Scoville): I show you what has been marked Plaintiff's Exhibit 3 for identification. Do you recognize this plat? A. Yes.

Q. And by whom was it prepared?

A. It was prepared by me.



(Testimony of Samuel Hurlbert.)

Q. And of what is it a layout or drawing?

A. It is a portion of the highway as shown here, as shown on this drawing.

Q. And by "this" you mean Exhibit 1 in evidence? A. Yes.

Q. Now, on what scale is this drawn?

A. This is drawn one inch equals three feet. [47]

Q. And would you show me precisely what section of the highway as shown on Exhibit 1 you have reproduced on Exhibit 3? Can you show me the area covered?

A. Yes, sir. This covers this area from here to about here (indicating).

Q. Now, for the record, is the area with reference to the culvert, where does it include the culvert? A. Yes, it includes the culvert.

Mr. Wilmer: May we have it marked on there, your Honor, so in the future we can know what he is referring to instead of just "here" and "there"? Can we put an X, Y or Z or something?

Mr. Scoville: Be happy to, certainly.

Q. (By Mr. Scoville): Will you tell us approximately by making a "X" at the east end of the enlargement and a "X" at the west end?

(Witness indicates on diagram.)

Q. Between the two X's on either side of the south side of the road, on either side of the culvert, you have enlarged that area, have you?

A. Yes.

Q. And it includes what, the pavement itself?

(Testimony of Samuel Hurlbert.)

A. Yes, it includes the pavement and the culvert and the guideposts.

Q. And it is to scale of one inch equals three feet, is [48] that correct? A. Yes.

Mr. Scoville: We offer 3.

Mr. Wilmer: May I ask a question?

The Court: Yes.

Q. (By Mr. Wilmer): How many feet lengthwise does this cover, Mr. Hurlbert?

A. That covers about two hundred fifty feet.

Mr. Scoville: I might say to the Court, we are offering this plat for subsequent use by the witnesses and an enlargement. The other is so small itself.

Mr. Wilmer: May I ask a further question?

The Court: Yes.

Q. (By Mr. Wilmer): In this area, Mr. Hurlbert, is there a large area which is not cement but which is shown in here as cement in the highway?

A. I don't believe so, but I can't be certain about that. There is a patch, a dark colored patch over the culvert.

Mr. Wilmer: Well, I assume counsel is offering this as being the area of the accident; I have proceeded on that basis.

Mr. Scoville: Yes, that is true.

Q. (By Mr. Wilmer): Mr. Hurlbert, are you certain this area you have shown us as Portland cement is cement in fact all the way through here? Did you make any examination to [49] determine that?

(Testimony of Samuel Hurlbert.)

A. I didn't examine. I didn't go underneath that black area to see.

Mr. Scoville: I didn't understand.

The Witness: I didn't go under the black area to see if that was concrete. However, I took elevations across that area and the elevations were as per stated on the——

Q. (By Mr. Wilmer): No, I am not questioning that, Mr. Hurlbert; I am asking you if in this area there isn't a large piece of the pavement, some twenty-five or thirty feet, which isn't cement but has been replaced by bituminous black top?

Mr. Scoville: The witness answered it was patched by black top; he didn't know how far the black top went but there was a bituminous patch in the pavement.

The Court: He may answer that.

The Witness: What was the last question?

(The last question was read.)

Q. (By Mr. Wilmer): In other words, if you drove over this highway you wouldn't see solid cement but you would see an area that was black top?

A. That is right; you would see an area about twenty-five or thirty feet which is black top.

Q. That has not been shown on there?

A. No; that isn't shown on there.

Q. Do you have any way of placing it on here so this would [50] accurately show what that is?

A. It would be placed on there, approximately.

(Testimony of Samuel Hurlbert.)

Mr. Scoville: We would be perfectly willing to have him place it on.

Mr. Wilmer: If he could do it I think we should have it accurate. We would have no objection to Mr. Hurlbert doing that at his convenience.

Mr. Scoville: Mr. Hurlbert, it would only take a moment to outline the area where the black patch is over the culvert?

The Witness: Yes.

Mr. Scoville: We can do that. Does counsel have any objection to the offer?

Mr. Wilmer: I would like to have it complete before it is received.

The Court: You may step down and put that on there.

The Witness: Do you have any objection to my looking at the photograph?

Mr. Wilmer: I had assumed he had notes or something else. If he is going to rely on the picture we had better rely on the picture. If he can indicate where it is, we can look at the picture.

The Witness: I can indicate it approximately.

Mr. Wilmer: That is all right.

Mr. Scoville: Just from your memory, approximately [51] where it lies. Outline it, please.

Mr. Wilmer: I would prefer if he would indicate the area and let the pictures speak for themselves.

The Witness (Indicating): I think that is approximate.

Mr. Scoville: Now, we offer Plaintiff's Exhibit 3.



(Testimony of Samuel Hurlbert.)

Q. (By Mr. Wilmer): This area you have drawn there, is that from your memory or do you have any accurate way of arriving at how much it represents?

A. Well, that wasn't drawn from memory; it is an enlargement of this——

Q. I am speaking of the area I suppose you have indicated as being the black top area.

A. Well, yes; that is drawn from memory and it is only approximate.

Mr. Wilmer: With that understanding we have no objection.

The Court: It may be admitted. The record will show the black top area the witness has been speaking of is marked by two crayon lines, two black crayon lines.

(Plaintiff's Exhibit 3 marked in evidence.)

Mr. Scoville: With the Court's permission, might I set this down here, only for the purposes of holding this long exhibit? I am using this for a back, something to hold it against.

Q. (By Mr. Scoville): Mr. Hurlbert, I wonder if you would [52] step down to Exhibit 3? Again the top of this plat is indicated as north?

A. Yes.

Q. Would you point to the culvert you have referred to in your testimony a few moments ago?

A. The culvert here, dotted lines.

Q. You said the dotted lines represent what?

A. The dotted lines represent the location of the culvert.



(Testimony of Samuel Hurlbert.)

Q. You have labeled the north shoulder of the highway as mixed bituminous surface, the same on the south? A. Yes.

Q. These are the distances you referred to a few moments ago? A. Yes.

Q. Eight-foot shoulder on an eleven-foot concrete highway? A. Yes.

Q. To my right, standing with the map, you have labeled "To Williams"? A. Yes.

Q. And the other direction, "To Flagstaff"? A. Yes.

Q. That is all in proportion to the scale of one inch equals three feet? A. Yes.

Q. Counsel wanted you to indicate that part of the [53] concrete you said was covered with some black patching, you didn't know how deep it was. The record shows over the area of the culvert; the record shows you have made two black crayon lines?

A. Yes.

Q. Indicating the general area of the patch on the white concrete? A. Yes.

Q. Would you indicate to the jury just where those lines are?

A. Right here and here (indicating).

Q. You have again labeled "guideposts" on the north side of the highway? A. Yes, sir.

Q. Those guideposts are approximately how far apart, what distance?

A. Approximately fifty feet apart.

Q. All right; you may be seated. Do you recall the placement of any signs at the general location

(Testimony of Samuel Hurlbert.)

of the culvert with reference to the direction of traffic?

A. You mean—what do you mean now?

Q. As to the position traffic shall keep on the highway? I don't want to lead you.

A. Yes, sir; there was a sign in the neighborhood of the culvert. [54]

Q. Will you show us approximately where?

A. Approximately in here somewhere; I don't know exactly.

Q. You might make a mark and put "sign."

(Witness indicates.)

Q. Do you recall the designation, what the sign says? If you do, Mr. Hurlbert? If you don't, that is all right.

A. No, I don't recall the exact wording of the sign.

Q. Now, incidentally, the pointer I have given you for future use, we have a scale here, the only scale showing on this is one inch equals three feet, is that correct?      A. Yes.

Mr. Scoville: You may cross-examine.

### Cross-Examination

By Mr. Wilmer:

Q. This sign you speak of that you indicated here by a "1" with whatever it may be, that is an approximation?

A. Yes, that is only an approximation.

(Testimony of Samuel Hurlbert.)

Q. It could vary ten feet either way?

A. Yes, it could vary that much.

Q. One other question. This streak of highway here? A. Yes.

Q. Did you determine what is the bank of that highway, how much is the curve banked?

A. Yes.

Q. How much is it banked? [55]

A. Well, according to the engineering data the super is 0.054 per foot. That means for every foot you go out this way or every foot you go this way the highway is either lowered or raised by that distance.

Q. Excuse me. I am speaking now, tell me with respect to the culvert here. A. Yes.

Q. How much lower is this edge of the pavement than the north edge of the pavement?

A. Two feet.

Q. Two feet?

A. That is shown right here.

Q. As you follow through here, is that approximately the same bank to the curve?

A. That is right.

Mr. Wilmer: That is all.

Mr. Scoville: That is all.

ROBERT MARTIN FRONSKE

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Scoville:

Q. State your name, please.

A. Robert Martin Fronske. [56]

Q. Your business is what?

A. Photography.

Q. I believe you are a commercial photographer?

A. Yes.

Q. You have a place of business in Flagstaff?

A. Yes.

Q. How long have you been engaged in the photography business?

A. About sixteen years.

Q. How long have you maintained a commercial establishment in Flagstaff?

A. About that long.

Q. Your place of business is where?

A. 21 East Aspen in Flagstaff.

Q. You have been there almost sixteen years?

A. Yes, sir.

Q. That is your livelihood is commercial photography, is that right?      A. Yes.

Q. During the course of that time you have done all sorts of commercial photography, have you?

A. Yes.

Q. Including photography of scenes, landscapes, as well as of persons and people?

(Testimony of Robert Martin Fronske.)

A. Yes. [57]

Q. And at my request in July, 1955, or at the request of an associate of my office, did you go to an area approximately seven and one-half miles west of Flagstaff and there make some pictures?

A. Yes, sir.

Q. Do you recall approximately what date that was?

A. It was about the 12th, I believe.

Q. About the 12th of July, last year?

A. Yes, sir.

Q. You then, after making those photographs, supplied me with prints from the negatives, is that correct?

A. That is correct, sir.

Q. Also on that same date, did you have occasion to photograph a Hudson automobile and also a truck?

A. Yes, sir.

Q. In Flagstaff, that had then been removed to Flagstaff?

A. Yes, sir.

Q. Where did you photograph the automobile, the Hudson, I believe it is.

A. It was in Caffey's Used Car or Wrecked Car Shop, I think.

(Plaintiff's Exhibits 4 to 12 marked for identification.)

Q. (By Mr. Scoville): I show you first of all two photographs which have been marked Plaintiff's Exhibits 4 and 12. Do you recognize those photographs? [58]

A. Yes, sir.

Q. And by whom were they taken?

A. By me, sir.



(Testimony of Robert Martin Fronske.)

Q. Were those the pictures taken by you at the time referred to, at the time you went out to the scene seven and one-half miles from Flagstaff?

A. Yes, sir.

Q. Do those pictures reflect, to the best of your ability as a photographer, the conditions as they appeared to the eye at that time and place?

A. Yes, sir.

Q. These are straight enlargements from the negatives? A. That is correct.

Q. Without any retouching, anything of that sort? A. Yes, sir.

Mr. Scoville: We offer these two, Plaintiff's Exhibits 4 and 12.

Q. (By Mr. Scoville): I show you a series of photographs which are Plaintiff's Exhibit 9, Plaintiff's 10, Plaintiff's 5, Plaintiff's 7, Plaintiff's 8. Would you examine those, please, and in each instance of what are they a picture?

A. They are a picture of the Hudson taken from different angles.

Q. Of the Hudson automobile?

A. Yes, sir. [59]

Q. On approximately July 12th at the garage in Flagstaff? A. Yes, sir.

Q. In each instance do these, to the best of your ability, reflect true and accurately the conditions as then appeared with reference to the automobile and with reference to the material covered by the picture? A. Yes, sir.

Mr. Scoville: We offer the 8, 7, 5, 10 and 9.

(Testimony of Robert Martin Fronske.)

Mr. Wilmer: May I ask a question, if it please the Court, with respect to plaintiff's offer of 12 and 4, of the witness? I wasn't sure, when did you say you took these pictures?

A. I believe it was about the 12th of July, sir.

Q. (By Mr. Wilmer): Of what year?

A. Last year.

Q. 1954? A. Yes, sir.

Q. Now, do you have any knowledge yourself whether the conditions you saw here were the same as the conditions that existed at the time of this accident?

Mr. Scoville: If your Honor please, I think I will withdraw these offers until they are connected later on, if you wish that objection——

Mr. Wilmer: I haven't made an objection. I was trying to find out if there was a basis for an objection. [59-A]

Mr. Scoville: This witness was not at the scene prior to that time. In order to save time we will at this time withdraw the offer until the pictures are connected up; as well as withdrawing the offer of the last four just referred to.

The Court: You offered five, did you not?

Mr. Scoville: Five. Yes, five pictures of the sedan.

The Court: Being Exhibits 5, 7, 8, 9 and 10?

Mr. Scoville: Yes. We will not make the offer at this time.

The Court: Very well.

(Testimony of Robert Martin Fronske.)

Q. (By Mr. Scoville): I show you Plaintiff's Exhibits 6 and 11. Of what are they a picture?

A. That was an automobile parked behind the garage, Hutchison Motors, on the same day.

Q. July 12th, 1954? A. Yes.

Q. Is it also true in these cases these photographs correctly and accurately reproduce the material shown in the photograph as appeared to the human eye? A. Yes, sir.

Q. To the best of your ability as a commercial photographer? A. That is right.

Mr. Scoville: We do not offer these at the time. That [60] is all the questions we have of this witness.

Mr. Wilmer: Will the Court pardon me just a moment?

Cross-Examination

By Mr. Wilmer:

Q. Were these all the pictures you took, Mr. Fronske? Did you take some additional prints besides these? A. Yes, sir.

Q. What happened to those?

A. I don't know; they weren't submitted. I guess.

Q. You did take additional pictures which have not been produced here? A. I believe so.

Q. How many? A. I don't know, sir.

Q. Quite a substantial number?

A. I wouldn't say any great number.

Q. Do you have any idea?

(Testimony of Robert Martin Fronske.)

A. There was a few more of the truck, I believe.

Q. How many?

A. I believe I took a couple of the back of the truck—no, I took pictures of each door of the truck.

Q. Take any more pictures of the Hudson sedan?

A. No, sir; I think that is about all I took of that.

Q. Do you have any record to show how many you took?

Mr. Scoville: Mr. Wilmer, I have some more here if you [61] want them. We offer them all.

Mr. Wilmer: We would expect them to be properly identified, your Honor. If counsel will identify them we will examine them and be happy to accede if they are identified.

Mr. Scoville: They are repetitious and don't pertain to these issues, but I will offer them to counsel and he can have them marked if he wants to.

Mr. Wilmer: No; I am asking the witness if there are additional pictures, if so, how many?

The Witness: I think they are there.

Q. (By Mr. Wilmer): Do you have any record of how many you took?

A. I have them at home, yes, sir.

Q. You didn't bring that with you?

A. No.

Q. With respect to Plaintiff's 11 and 6, I assume the witness will want to be excused and I would like to ask a question. What do they purport to be a picture of?

A. As I remember, they wanted to show——

(Testimony of Robert Martin Fronske.)

Q. What portion of the vehicle?

A. It is the bumper of the truck; the front bumper.

Q. This truck was where at the time?

A. It was parked behind the Hutchison Motors.

Mr. Wilmer: That is all.

Mr. Scoville: If the Court please, there are so many [62] photographs I may have overlooked one. May this be marked for identification?

(Plaintiff's Exhibit 13 marked for identification.)

Q. (By Mr. Scoville): Mr. Witness, did you take this picture?

A. Yes, sir; I believe I did.

Q. I think that is yours.

A. I think that is right.

Q. Now, what, if any, part of the area of the highway in question does that cover?

A. Well, that looks like the point of impact.

Mr. Wilmer: Just a moment. I move to strike the answer as not responsive.

The Court: It may be stricken and the jury will disregard the last answer of the witness.

Q. (By Mr. Scoville): Do you recall a patch of black top on the area you examined out there when you photographed it, black top on the concrete?

A. Yes, sir.

Q. Is this a photograph of that area?

A. That is correct.

Q. Did it truly and accurately depict the condi-



(Testimony of Robert Martin Fronske.)

tions with reference to the material shown in this photograph on the morning of the 12th of July, 1954, when you made the picture?      A. Yes, sir. [63]

Mr. Scoville: We offer Plaintiff's Exhibit 13.

Mr. Wilmer: We make the same objection, your Honor. It is a picture made some two days later with no showing it has any probative value with respect to the time of the occurrence some two days earlier.

Mr. Palmquist: Counsel has raised some objection to that black top. We have now found him a picture.

Mr. Wilmer: Counsel knows it isn't offered for that purpose. It is offered for something for which a foundation has not been laid.

Mr. Scoville: We offered it for the purpose of showing the black top area, and for whatever else it may show, of course. But it is certainly an orderly presentation with matters concerning the black top area over the culvert, and this is only two days later.

The Court: It may be received.

Mr. Wilmer: May it please the Court, do I understand it is being received for the purpose of showing the black top area, or for the purpose of showing anything with respect to the accident?

Mr. Palmquist: The black top area is the only reason we offered it.

The Court: All it shows is the highway at the point the witness has testified to and the pavement there. There is nothing else on it. [64]

(Plaintiff's Exhibit 13 marked in evidence.)

(Testimony of Robert Martin Fronske.)

Mr. Scoville: May we exhibit the picture to the jury?

The Court: Yes.

Q. (By Mr. Scoville): Now, Mr. Wilmer asked you about some other pictures you knew you had taken, some additional pictures. May these six pictures be marked for identification?

The Court: Separately or——

Mr. Scoville: I think as a group would save time.

The Court: Very well.

(Plaintiff's Exhibit 14 marked for identification.)

Q. (By Mr. Scoville): I show you a group of pictures just referred to. Are these the additional pictures you spoke of concerning pictures of the truck?      A. Yes, sir; that completes it.

Mr. Scoville: We offer the additional group.

Mr. Wilmer: There has been no foundation laid, your Honor, to justify their admission.

Mr. Scoville: The only purpose in offering them is the purpose of taking away any innuendo that we are concealing any pictures. I don't think they are particularly material.

The Court: Objection sustained.

Mr. Scoville: That is all.

(Testimony of Robert Martin Fronske.)

Cross-Examination

By Mr. Wilmer:

Q. Before you told me, Mr. Fronske, you thought the only [65] pictures you took were some pictures of the truck; Mr. Scoville produced a picture of the highway which you then recalled as an additional picture you had taken. Are you sure now we have had produced all the pictures you took, are you positive?

A. No, I am not positive, not without checking my negatives.

Mr. Wilmer: That is all.

Mr. Scoville: That is all.

(Witness excused.)

ROBERT RUSSELL HARRIS

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Palmquist:

Q. Your full name is Robert Harris?

A. Robert Russell Harris.

Q. Mr. Harris, where do you reside?

A. I am stationed at the Navajo Ordnance Depot.

Q. What is your occupation?

A. I am a soldier.

Q. How long have you been a soldier?

(Testimony of Robert Russell Harris.)

A. Will be twenty years in October.

Q. Are you a married man? A. Yes, sir.

Q. What is your wife's name? [66]

A. Edith Harris, sir.

Q. What is Mrs. Harris' occupation?

A. She is a professional nurse, sir.

Q. Do you folks have children?

A. Yes, sir.

Q. I want to call your attention to the 10th day of July of last year, 1954, at a point approximately seven and one-half miles west of Flagstaff. Were you on that road on that day at about 3:00 o'clock a.m.?

A. Yes, sir.

Q. Where were you coming from at that time?

A. My wife was working in the hospital at Flagstaff and I had gone down to bring her back home.

Q. Would you keep your voice up; everybody has to hear this?

A. All right, sir.

Q. What was the name of the hospital where your wife was working as a nurse?

A. It was the Doctors Hospital in Flagstaff, sir.

Q. The Doctors Hospital? A. Yes, sir.

Q. As you drove west, you were driving on Highway 66, were you?

A. Yes, sir.

Q. Is that a two or more lane highway?

A. It can be made into a four-lane highway, but it is a [67] two-lane highway, sir.

Q. It is a two-lane highway?

A. Yes, sir; I would think so, yes, sir.

Q. Does it have a center line down it?

A. Yes, sir.

(Testimony of Robert Russell Harris.)

Q. And the highway there runs generally in what directions?

A. Well, northeast and southwest, I believe, sir.

Q. As you drive from Flagstaff out to this point we have been talking about seven and one-half miles west of Flagstaff; would you tell his Honor and the gentlemen of the jury how many turns approximately, or what kind of a road is it, whether it is mountainous or not?

A. Sir, it is rather hilly and there are quite a few curves in it.

Q. Quite a number of curves, is that correct?

A. Yes, sir.

Q. What were the weather conditions as you came along there that night?

A. It was cool, sir, but the weather was nice.

Q. Was it clear? A. Yes, sir.

Q. Was there any ice on the road, anything like that? A. No, sir.

Q. Was the pavement dry?

A. Yes, sir. [68]

Q. There was no fog, anything of that nature to hinder visibility? A. No, sir.

Q. What was the first thing you observed, if you did observe such a thing, that was out of the ordinary as you came along there that night?

A. We started around this curve and down the hill and I saw some lights that were—I don't know how far it was away, sir, but then I slowed down and there was a gentleman, I don't know who he was, with a flashlight waving it up and down. So



(Testimony of Robert Russell Harris.)

we stopped and I asked him what had happened; he said, "There is an accident up ahead." And I said, "Is anybody hurt?" He says, "There is quite a few people in one of the cars up there and they seem to be in pretty bad shape." I said, "My wife is a professional nurse; I will go on down." So then I drove on down past the car; did a U turn and flashed my lights back into the side of the car.

Q. Was that the Hudson, when you say the car?

A. Yes, sir; the car that was in the accident, sir.

Q. Where was that Hudson on the highway?

A. It was on the north side of the center line, sir, on a black top there, sir.

Q. There was some black top there?

A. Yes, sir.

Q. And where would the rear end of the [69] car be?

A. Well, it would be, I know one wheel of the rear end of the car was off of the one lane on the one side.

Q. And how far would the front end of the car be from the center line?

A. I would say at least four feet, sir.

Q. At least four feet?                      A. Yes, sir.

Q. Did that car appear to have been in an accident?                      A. Yes, sir; that it did, sir.

Q. What portions of that car appeared to have been damaged?

A. Well, it was the left side and the front end of it was especially damaged, the left side. That is standing at the rear of the car, the driver's side.

(Testimony of Robert Russell Harris.)

almost all the front end and right on through where the driver sat.

Q. And you say the people were still in the car?

A. Yes, sir. There were at least four people in the car. I think one of the children was standing on the outside. I am pretty sure one of the children was standing on the outside, sir.

Mr. Palmquist: May I have this marked for identification, please?

(Plaintiff's Exhibit 15 marked for identification.)

Q. I am going to show you a picture—there is some typing on the back of this which I will take off—and I will [70] ask you whether or not you can recognize that picture?

A. That's a picture of the car that was in the accident.

Q. Is that the car you were talking about?

A. Yes, sir.

Q. Could you tell this jury and this Court whether or not that is a correct representation of the position of that car before it was moved?

A. As near as I can see from here, yes, sir. But I can't see the center line so, therefore—but this is the automobile and in the position I would think it was in, seeing it at night, sir.

Q. Yes. Would that be about the view you had as you swung your lights onto that car?

A. No, sir. I didn't put my lights on the side of the car here; I put them on the other side.

(Testimony of Robert Russell Harris.)

Q. On the opposite side?

A. Yes, sir; I was on the north side of the highway shining my lights into the right side of this automobile.

Q. Does that accurately portray the damage you saw to that Hudson car that night?

A. I would say yes, sir.

Q. And did you learn, as you were around the scene of the accident, that that car had been pulling a two-wheel trailer?

A. Yes, sir, a trailer. I don't remember whether it was a two-wheel trailer but I do know it was pulling a trailer. [71]

Q. And did you find a tarpaulin such as is thrown over such trailer?

A. Well, sir, I observed something but I didn't know whether it was a blanket or tarpaulin or what.

Q. Or canvas?

A. Yes, sir; it was some kind of canvas or blanket.

Q. Do you see that canvas, tarpaulin or blanket we are talking about in that picture?

A. Yes, sir.

Q. And it shows it hanging on the left side of that Hudson, does it?

A. Yes, sir.

Q. Now, did you find scattered in the wreckage of that Hudson on the left side any other things that had come from other than parts of that automobile?

A. There was some debris, I imagine, that came from the trailer, and some glass right down beside the car.

(Testimony of Robert Russell Harris.)

Q. Did you find some personal belongings, for example?

A. Not on that side. I found them off on the other side of the highway on the north side of the center line, off the highway completely. And there were some papers scattered on the highway, too.

Q. This picture of this car in this position is on the north side of the highway, is it not?

A. Yes, sir. [72]

Q. Did you, as you drove down there that night, did you actually drive by this car?

A. Yes, sir.

Q. In which lane of travel did you go to go by that car?      A. In the south lane, sir.

Q. Did you have to run over any personal property or debris of any kind in that lane of traffic?

A. Not that I remember, sir.

Q. Did you see any such debris?

A. No, sir.

Q. Did you see such debris, however, in the west-bound lane of traffic or north of the center line?

A. Yes, sir; there was glass and other debris, yes, sir.

Q. Did you find—did you see any children's toys scattered out there any place?

A. Yes, sir; there was doll carriages and other things like that.

Q. Did you see any paper napkins of any kind?

A. Yes, sir; I saw some paper napkins that were probably used for a birthday or party of some sort.

(Testimony of Robert Russell Harris.)

Q. Why do you say they were used for a party of some sort?

A. Well, most of the time when you go on a picnic or something you generally take napkins with you.

Q. You said birthday; did these napkins say, "Happy birthday," do you recall? [73]

A. There were some that said, "Happy birthday," and there were other napkins along, too, sir, paper napkins.

Q. As you look at that picture, can you also see there the edge of a black asphalt area you have spoken about?

A. Yes, sir.

Q. I will call your attention to a picture which is already in evidence and which was taken—I am referring to Plaintiff's Exhibit 13—and do you recognize that black patch across the culvert?

A. I would presume it is the same one, yes, sir.

Q. Does it look to be the same?

Mr. Wilmer: Just a moment. This witness is able to testify, your Honor. Presumptions are of no consequence to us.

The Court: The objection is sustained.

The Witness: Looking at the picture I would say it is the same one.

The Court: Mr. Harris, I have sustained the objection. Counsel will have to ask another question.

The Witness: Sorry, sir.

Q. (By Mr. Palmquist): How long have you lived in that region?

A. I was up there one year this past November.

Q. You have been there a year then?



(Testimony of Robert Russell Harris.)

A. Yes, sir. I have been there two years this coming November. [74]

Q. Two years this coming November?

A. Yes, sir.

Q. Can you recognize that as the highway where this accident occurred? I am referring to that one——

A. Yes, sir.

Q. I am referring to Plaintiff's Exhibit 13 in evidence. Can you tell me what those black marks are on that highway that you see?

Mr. Wilmer: If it please the Court, we object to the witness interpreting the picture. I don't know what he is referring to as "black marks" to begin with and, secondly, the picture itself speaks for itself.

Mr. Palmquist: Counsel, will you stipulate that is the black patch on the culvert? That is all I want to establish. It is the black patch on this culvert. Have you any doubt in your mind about that?

Mr. Wilmer: I believe the question was whether or not he could tell what the black marks were, if it please the Court, and I object——

The Court: He can answer if he knows.

The Witness: On this one right here——

Mr. Wilmer: Just a moment. Which one are you referring to? There is one not in evidence.

The Court: This is 13. It is in evidence.

Mr. Wilmer: We request the exhibit either be offered [75] in evidence, your Honor, or——

The Court: The counsel is asking now about one that is in evidence.

(Testimony of Robert Russell Harris.)

Mr. Wilmer: I agree, your Honor, and I have no objection to that.

Mr. Palmquist: May I proceed, your Honor? Thank you.

Q. (By Mr. Palmquist): Do you recognize that black patch in number 13, being the black patch across this culvert there? A. Yes, sir.

Q. In this picture you have been describing as being a true representation of what you saw that night, Plaintiff's Exhibit 15 for identification, can you see the edge of that black mark?

A. Yes, sir.

Q. And which edge of the black mark would it be? A. The northeast edge.

The Court: Counsel, don't inquire about the picture until it is offered. I think you are now getting into the matter Mr. Wilmer was objecting to a moment ago.

Mr. Palmquist: All right. Could I offer the picture at this time before the recess?

The Court: Counsel will want to look at it anyway and he can do that during the recess. We will take the afternoon recess for about ten minutes. During the recess please bear in mind the admonition heretofore given you.

(Recess.) [76]

Q. (By Mr. Palmquist): This Plaintiff's Exhibit 15, you have already testified that you see the tarpaulin or blanket, whatever it was there?

A. Yes, sir.

(Testimony of Robert Russell Harris.)

Q. And the damage to the car that you saw?

A. Yes, sir.

Q. And the position of the car in relation to the edge of the black top?           A. Yes, sir.

Q. I am going to ask you one more question. This line running across there, do you remember what that was?

A. No, sir; I don't remember what that line was.

Q. But is this picture a true and correct representation of what you saw there the very night of this accident?           A. Yes, sir.

Mr. Palmquist: We offer this picture in evidence at this time, if your Honor please, Plaintiff's Exhibit 15.

Mr. Wilmer: May I ask a question, please?

The Court: Very well.

Q. (By Mr. Wilmer): How long did you stay there when you first got there, Sergeant?

A. I stayed there approximately five minutes, then I went for an ambulance.

Q. Then you went back for an ambulance, then you returned?           A. Yes, sir. [77]

Q. During the time you were there this five minutes the light that was there was the light from your car and the patrol car was there—had the patrol car arrived?

A. The patrol car hadn't got there at that time, sir.

Q. Did you make an examination of the vehicle at the time, the first five minutes you were there?

A. No, sir.

(Testimony of Robert Russell Harris.)

Q. This is an examination you made after you returned?      A. Yes, sir.

Mr. Wilmer: We believe there has been a sufficient foundation laid, your Honor.

The Court: It may be received.

(Plaintiff's Exhibit 15 marked in evidence.)

Mr. Palmquist: Perhaps counsel will stipulate, without going through the same foundation, this was the second picture taken. It is a little closer view.

Mr. Wilmer: We are not prepared to stipulate, your Honor——

Mr. Palmquist: Very well.

Mr. Wilmer: Pardon me just a moment, Mr. Palmquist, please. I was addressing the Court. If I might complete I would appreciate it. We will not stipulate that picture is a correct representation. I do object to the additional offer and upon the ground it is without additional corroborative evidence, but I will agree the witness in question would [78] testify the same as he has testified to this picture here.

Mr. Palmquist: On that basis I will offer this one.

Mr. Wilmer: May I approach the bench?

The Court: What is the number of the picture?

Mr. Palmquist: I haven't had this marked—I will withdraw it and go about it properly.

The Court: Very well.

Mr. Palmquist: May I have this marked for identification? First I will withdraw the typing on the back of it.

(Testimony of Robert Russell Harris.)

(Plaintiff's Exhibit 16 marked for identification.)

Mr. Palmquist: May I have Plaintiff's Exhibit 15 in evidence?

Q. (By Mr. Palmquist): You have already identified Plaintiff's Exhibit 15 that is in evidence?

A. Yes, sir.

Q. And I would like to have you look at Plaintiff's Exhibit 16, and is that substantially the same view with the exception of a little different shutter speed and——

A. Yes, sir.

Q. And everything you told us about Plaintiff's Exhibit 15 would be true of Plaintiff's Exhibit 16 for identification?

A. Yes, sir.

Mr. Palmquist: We offer the picture in evidence, if your Honor please.

Mr. Wilmer: We have no objection. [79]

(Plaintiff's Exhibit 16 marked in evidence.)

Q. (By Mr. Palmquist): Now, Mr. Harris, did you also find there was another vehicle involved in that accident?

A. Nothing, only the trailer that was behind the Hudson.

Q. I meant another vehicle. Did you find what had struck this Hudson?

A. There was a truck on down—going east on Highway 66 toward Flagstaff.

Q. During the recess I showed you Plaintiff's Exhibit number 3 in evidence.

A. Yes, sir.



(Testimony of Robert Russell Harris.)

Q. And explained it to you. And I wonder if you could step down here and referring to Plaintiff's Exhibits 15 and 16, to refresh your memory, draw in first the position of the Hudson as you know it to be. The scale of this map, as I pointed out to you, is one inch equals three feet. And could I ask counsel through the Court if he would stipulate this Hudson would be approximately six feet wide and, say, approximately fifteen or sixteen feet in length?

Mr. Wilmer: I have no actual knowledge, but if counsel says that is true.

Mr. Palmquist: I don't know; I am just guessing.

Mr. Wilmer: I don't want to stipulate if I don't know, but if counsel is prepared to make the statement, it is true I will accept it. [80]

Mr. Palmquist: I will take counsel's statement on the length of the car.

Mr. Wilmer: I don't know.

Mr. Palmquist: I don't think it is material in the case, but for the purpose of drawing roughly to scale.

Mr. Wilmer: I have no notion; I assume it is approximately that size. I never measured one and I don't know.

Q. (By Mr. Palmquist): Would you draw this approximately in the position it was—by the way, before you do that, would you turn around and face the jury to answer this next question? Did you make some kind of a measurement of the distance

(Testimony of Robert Russell Harris.)

between the left-hand front corner of this Hudson and the center line?

A. No, sir; I judged it to be at least four feet on the north side.

Q. At least four feet? A. Yes, sir.

Q. Will you draw in roughly for us, and using this scale, if you want it six feet it is on there; if you want sixteen feet it is on there. Draw in the position, referring to these pictures to refresh your memory.

Mr. Scoville: That is the scale now.

Mr. Palmquist: In other words, if you want four feet, it is right on there.

Mr. Scoville: It is a scale.

(Witness indicates on diagram.)

The Witness: I would say that is [81] about the position of the car as I saw it.

Q. And which was the nose?

A. This was the front end of the car.

Q. Put an arrow down here, and I will close the back end of the car in. We will call that "H-1," if your Honor please. And that is the car that is seen here in Plaintiff's Exhibits 15 and 16, is that correct?

A. Yes, sir; as closely as I can put it on there; yes, sir.

Q. Now, did you find another car or truck there at the scene of the accident that had been involved in a collision with this car?

Mr. Wilmer: Just a moment. If it please the

(Testimony of Robert Russell Harris.)

Court, we object to counsel assuming something which is not in evidence.

The Court: The objection is sustained.

Q. (By Mr. Palmquist): All right. Did you find something, anything of any kind, a rock or meteor or anything?

A. There was a truck, I would say one hundred fifty feet in the direction of Flagstaff over on the north side of the highway.

Q. All right. A truck.

A. Yes, sir. It was off the highway down into sort of a field there.

Q. Did that truck remain in the position it was in when you first saw it—and you got there before the patrol officer, [82] you testified, you are sure of that? A. Yes, sir.

Q. Did it remain in that position until the next day without being moved?

A. Yes, sir; it did.

Q. I will show you a picture; I will have this picture marked in evidence.

(Plaintiff's Exhibit 17 marked for identification.)

Q. (By Mr. Palmquist): Can you identify this as the truck you saw there?

A. Yes, sir; that is the truck and in the same position.

Q. And in the same position?

A. No; this is not the truck. This is not the

(Testimony of Robert Russell Harris.)

truck. This is not the truck. Do you have some other pictures?

Q. Yes, I do.

A. This has a wrecker in the front of it, doesn't it, sir?

Q. Yes, I believe that is right. Here, I have a closer up view.

A. I can't see that truck from here. I think it is a wrecker.

Q. This is a closer deal.

(Plaintiff's Exhibit 18 marked for identification.)

Q. Now, I call your attention only to the rear end of the truck.

A. The rear end of the truck is the same, but I can't see [83] the front end of the truck for this other vehicle in front of it.

Q. Is that the same position it rested in that night when you came up there, as you did, before the Highway Patrol had gotten there?

A. Yes, sir.

Q. Which side of the highway is that?

A. This is the north side of the highway, sir.

Q. Do those truly and correctly represent, referring only to the left and left rear there—I mean it would be the right rear, pardon me, of that trailer?

A. Of the truck trailer?

Q. Yes.           A. Yes, sir.

Mr. Palmquist: If Your Honor please, we offer these two pictures in evidence, 17 and 18.

(Testimony of Robert Russell Harris.)

Mr. Wilmer: These, I take it, are offered for the sole purpose of showing the position the witness says the truck and trailer were in on the evening he came by there, is that right?

Mr. Palmquist: Or what other things the witnesses may point out. Those were taken the next morning, I understand.

Mr. Wilmer: If the Court please, I am prepared to agree to a lot of things that haven't been discussed in it that are shown in it. [84]

Mr. Palmquist: I haven't asked counsel to, if Your Honor please. I have only asked this go into evidence at this time to show the position of the truck. And the Sergeant has testified it is a true and correct photographic representation as he saw it.

The Court: For that purpose it will be received.

Mr. Wilmer: I desired to clarify the record. I thought counsel misunderstood.

(Plaintiff's Exhibits 17 and 18 marked in evidence.)

Q. (By Mr. Palmquist): Sergeant Harris, would you step down here, and using Plaintiff's Exhibits 17 and 18 in evidence to refresh your memory, would you take this black crayon and on Plaintiff's Exhibit 3 in evidence draw in the position of that truck and trailer, if you can, the approximate distance. Did you approximate that distance?

A. I approximated between one hundred fifty and two hundred feet.



(Testimony of Robert Russell Harris.)

Q. Between one hundred fifty and two hundred feet? A. Yes.

Q. All right, will you take this and approximate it and draw in the right rear corner of the trailer so we will have some basis. And I imagine we can use the figure of eight feet in width for the trailer.

A. Now, the truck and trailer were slightly jackknifed, not too much, but slightly jackknifed. The trailer was something [85] like that (indicating).

Q. Mr. Harris, would you draw that about eight feet wide. You have drawn the car about six feet wide; that would be at least eight feet wide, just to keep it somewhat in proportion.

Mr. Scoville: One inch is three feet on that one inch marker on that scale.

Mr. Palmquist: Could I ask counsel through the Court what the length of his trailer was?

Mr. Wilmer: Trailer or equipment?

Mr. Palmquist: The trailer.

Mr. Wilmer: Just the trailer?

Mr. Palmquist: Yes.

Mr. Wilmer: Thirty-four feet.

Mr. Palmquist: Thirty-four feet. Could we measure on here thirty-four feet.

Q. (By Mr. Palmquist): The trailer would be headed in which direction?

A. Headed in a northerly direction.

Q. So off the map in this direction I will make an arrow like that, if Your Honor please; we will call this "H-2."

All right, you may be seated, if you will, Ser-

(Testimony of Robert Russell Harris.)

geant. Now, Sergeant, did you look at various marks on the highway out there the night of the accident?

A. Yes, sir.

Q. Did various people come along after you were there? [86]

A. Yes, sir, there was some people there the next morning—well, we went back when it was light.

Q. That was the next morning?

A. Yes, sir.

Q. That night could you mention some of the people that came along that night that were there at the scene of the accident?

A. Well, the undertaker came, the fireman came.

Q. What fireman?

A. The fireman from Flagstaff, Arizona.

Q. While he was there did you see him do some washing down? A. Yes, sir.

Q. Do you know why that was done?

A. It was to eliminate the hazard of that gas catching on fire that was running across the highway.

Q. What gas was that, gas from the trailer and that equipment or from the Hudson?

A. It was from the Hudson. It was running continuously for a short while there.

Q. Was there considerable gas?

A. Yes, sir.

Q. So that was washed down, is that correct?

A. Yes, sir.

Q. And you were there before that washing down

(Testimony of Robert Russell Harris.)

process took place? [87]           A. Yes, sir.

Q. Did that washing down process change any of the skid marks that were left on the highway?

Mr. Wilmer: Just a moment, if it please the Court, we object to that. We have no objection to him testifying what he himself saw there before the washing down or after the washing down, but we object to his conclusion as to what was the effect of the washing down.

The Court: Yes, reframe the question.

Q. (By Mr. Palmquist): All right. Could you see any evidence in the gouge marks and skid marks you saw there before this washing process and the skid marks you saw after the washing process?

Mr. Wilmer: Same objection, if it please the Court. Until the marks that are shown are shown as related to the accident, until they are shown—

Mr. Palmquist: I will withdraw it and at this time put the marks in.

Q. (By Mr. Palmquist): I show you a picture—first, may I have this marked for identification? And I have an enlargement of that picture; and may I have that marked Plaintiff's Exhibit 19-A for identification?

(Plaintiff's Exhibits 19 and 19-A marked for identification.)

Q. (By Mr. Palmquist): Mr. Harris, I show you Plaintiff's [88] Exhibits 19 and 19-A for identification. Can you tell me which way that picture was taken, these pictures are taken?

(Testimony of Robert Russell Harris.)

A. This is taken northeast on the way toward Flagstaff.

Q. Looking toward Flagstaff. And can you see the rear of the trailer as you have drawn it in the position there?

A. Yes, sir.

Q. There happens to be a Highway Patrol car there too, of course.

A. Yes, sir.

Q. Do you also see some marks on the pavement?

A. Yes, sir, I do.

Q. Do you recognize those marks you see on the pavement?

A. They went directly from this——

Mr. Wilmer: Just a moment. If it please the Court, we object to the witness attempting to interpret the picture. We have no objection to him testifying what he himself observed there, but we object to him attempting to interpret the picture.

The Court: He is describing the marks, saying they went from one place to another. He hasn't attempted to say what they were.

The Witness: They went from this black mark to where the trailer came to rest.

Q. All right. In other words——

Mr. Wilmer: Just a moment. If it please the Court, [89] counsel again is asking the witness to testify to the contents before it has been offered in evidence and an opportunity given to object to it.

Mr. Palmquist: No, I am merely laying a foundation for the picture.

Mr. Wilmer: No, he is not, Your Honor.

Mr. Palmquist: I will withdraw the question. I

(Testimony of Robert Russell Harris.)

didn't get to ask the question before he objected that time.

Q. (By Mr. Palmquist): Will you say that these pictures, this one that is in glossy, and then the blowup of that picture, which is unglossy—

The Court: Refer to them by number, if you will.

Q. —which is Plaintiff's Exhibit 19 for identification and 19-A, 19-A being the blowup, a true photographic representation of the marks you saw there the night of this accident?

A. I didn't see those tracks that night. It was daylight the next morning when I saw them.

Q. Daylight the next morning? A. Yes.

Q. What time was that?

A. It was between 6 and 7 o'clock.

Q. Between 6 and 7?

A. On the 10th, 6 and 7 a.m., yes, sir.

Q. That was approximately three hours after the accident? A. Yes, sir. [90]

Q. At daylight at that time do you recognize these marks shown by these photographs, 19 and 19-A for identification, as being true and correctly represented in these photographs?

A. Yes, sir.

Mr. Palmquist: We will offer them in evidence.

Mr. Wilmer: We object, if it please the Court, on the ground there is no foundation laid. May I ask a couple of questions on voir dire?

Q. (By Mr. Wilmer): That night there was a very heavy amount of traffic along that highway?



(Testimony of Robert Russell Harris.)

A. There is between 6:30 and 8 o'clock, sir.

Q. That night the Patrol had trouble routing the cars past the accident, did they not?

A. There was quite a bit of traffic, yes, sir.

Mr. Palmquist: We will tie them in with numerous witnesses, if Your Honor please.

Mr. Wilmer: If it please the Court, until they are tied in we object on the ground——

Mr. Palmquist: They are tied in with this witness, if Your Honor please.

Mr. Wilmer: ——the picture taken at 6 o'clock, three hours or better after the accident, raises no presumption it correctly depicts the conditions that existed at the time of the accident.

Mr. Scoville: If Your Honor pleases, I would suggest [91] a picture taken three hours after the accident, it depends on what the picture shows. If I were stabbed at 3 o'clock in the morning and at 6 o'clock in the morning the knife was still in my back I submit the picture would be material.

The Court: I will let them in. It may go to the weight of it, the objection counsel has, but they will be admitted.

(Plaintiff's Exhibits 19 and 19-A marked in evidence.)

Q. (By Mr. Palmquist): Now, Mr. Harris, would you step down to Plaintiff's Exhibit 3 and take this red pencil, if you will, and by refreshing your memory by looking at Plaintiff's Exhibit num-

(Testimony of Robert Russell Harris.)

ber 19-A which is now in evidence, will you draw in the marks that you saw there?

A. You want me to draw both of these wheels?

Q. What you saw there that morning, say, and where they led up to.

(Witness indicates.)

The Witness: That is the way it went. Those are the duals of the trailer.

Mr. Wilmer: We object to that and ask it be stricken.

The Court: The answer may be stricken.

Mr. Wilmer: May I ask the Court, may the objection which we made to the materiality of the last two exhibits likewise go to further testimony or reference to them, or rather our objection to the fact there was not a proper foundation laid to their admission in evidence at this time, [92] and therefore further testimony to them would be inadmissible.

The Court: Very well, the record may show a continuing objection.

Mr. Palmquist: At this time we will mark these marks, if Your Honor please, as "H-3."

I would like to pass these pictures, if Your Honor please, to the jury in the order in which they have been gone over and the testimony, Plaintiff's Exhibit 13 as the black top; Plaintiff's Exhibit 15 as to the Hudson car, in relation to that black top; Plaintiff's Exhibit 16, another view of the Hudson in relation to that black top; Plaintiff's Exhibits

(Testimony of Robert Russell Harris.)

17 and 18, being the two different views of the trailer, and Plaintiff's Exhibit 19 and 19-A.

Would Your Honor care to see those?

The Court: No, I think I saw them as they were offered.

(Pictures passed to jury.)

Q. (By Mr. Palmquist): Did a wrecking car come to the scene of this accident before you left the scene of the accident?

A. You mean that night after the people were removed?

Q. Yes.

A. I don't remember whether one came before I left or not. As soon as the people, the lady which was the last one that was removed—no, the next to the last one that was removed from the car, when they took her away then we left shortly [93] after.

Q. When you came back the next morning, three hours later, did you find the Hudson car in the same position that it had been in or had it been moved?

A. I don't remember whether it was in the same position or not, but I know it was moved shortly after. Anyway, it was moved that morning sometime. I don't remember whether it was in the same position it was in after daylight as before, no, sir, I don't remember.

Mr. Palmquist: May I have this picture marked.

(Plaintiff's Exhibit 20 marked for identification.)

(Testimony of Robert Russell Harris.)

Q. I show you Plaintiff's Exhibit 20 for identification and ask you if you recognize that picture?

A. Yes, sir, that is the Hudson.

Q. And was that the position of the Hudson when it was in these other pictures that we have in evidence, Plaintiff's 16, or has it been moved?

A. It has been moved, sir.

Q. It has been moved? A. Yes, sir.

Q. Do you know how it was moved over there to that spot?

A. No, sir, I don't, because I didn't see it moved.

Q. You didn't see it moved?

A. No, sir, I didn't see it moved.

Q. But do you remember the next morning it was in this [94] position?

A. Yes, sir. Sometime the next morning I noticed it was in this position, yes, sir.

Q. Where is the Hudson in this position in relation to the black spot which was the patch over the culvert in the highway?

A. I would say it was about twenty or thirty feet, the position it rested in after the accident.

Q. Which way, going——

A. Toward the west.

Q. Pulled right off the road? A. Yes, sir.

Q. I noticed that you have the Hudson in these other pictures, and where you drew it on Plaintiff's Exhibit 3, as being in the black top.

A. Yes, sir, it is inside the black top, yes, sir.

Q. And you have the marks you saw there that started, starting in the black top about in front of

(Testimony of Robert Russell Harris.)

the Hudson, is that correct?      A. Yes, sir.

Q. And I notice you have all those marks starting north of the center line of the highway.

A. Yes, sir.

Q. You did that intentionally, did you?

A. No, sir, that is what I could see.

Q. That is what you saw? [95]

A. The continuous marks right straight up to the truck where it was stopped, sir.

Q. And westbound traffic would be traffic which is north of this center line, is that right?

A. Westbound traffic——

Q. Yes.

A. Repeat that, please, sir.

Q. Westbound traffic would be in this lane right here, would it not?      A. Yes, sir.

Q. And eastbound traffic in this lane right here, is that correct?      A. Yes, sir.

Q. And this is the white center line?

A. Yes, sir.

Q. That same area is shown on this map—if Your Honor please, could I draw a red line through these X's, you can't see them back there.

Mr. Wilmer: We have no objection.

Mr. Palmquist: Thank you, counsel.

Q. (Continuing): Then we have the culvert which shows right there, do you see that?

A. Yes, sir.

Q. Right above that arrow?

A. Yes, sir. [96]



(Testimony of Robert Russell Harris.)

Q. Do you recognize the curve in the highway there to Flagstaff?

A. This is to Flagstaff, that way, right, sir?

Q. No, that is to Williams or on to California and this is to Flagstaff this way.

A. The automobile would have been on this side of the highway.

Q. Or north of the center line.

A. North of the center line, yes, sir.

Q. And this would be the west bound lane and this would be the east bound lane?

A. Yes, sir.

Q. And that black asphalt was down here, the line on either side of that culvert, is that correct?

A. Yes, sir.

Q. Right in there (indicating).

A. Yes, sir.

Q. Now, Sergeant, you drive this many times, do you not?

A. Yes, sir. Not from Williams—I have driven it. But from the Navajo Ordnance Depot to Flagstaff I drive it quite often.

Q. The Navajo what?

A. Ordnance Depot.

Q. Where is that?

A. That is about three miles west, approximately three [97] miles west of this place right here.

Q. So you were going back and forth between the Navajo Ordnance Depot and Flagstaff many times, is that correct?

A. Yes, sir.

(Testimony of Robert Russell Harris.)

Q. Now, as a result of what you have seen, you had seen there that night and the next day, as you have shown us in these photographs, did you make some special observations concerning the place where this accident happened as to the curve?

A. Yes, sir, I have come in that curve quite a few times. And without turning the steering wheel I almost—well, there is a way you could pick up those tracks and go right straight where the truck landed up, sir.

Q. You mean if you were east bound in the proper lane of traffic down here, coming along, and as you come into this curve you mean if you don't turn your steering wheel—

A. Yes, sir, I could end up—

Q. What would happen?

A. —the same place where the truck does.

Q. We have a picture which was just identified, I believe, which is looking back—this had been admitted for identification, Plaintiff's Exhibit 4 for identification. Mr. Fronske from Flagstaff has identified this as being a picture taken looking westerly now.

A. Yes, sir. [98]

Q. And you see this coming from the black top, that would be the fourth pole, the fourth guidepost?

A. I didn't count those posts, sir.

Q. No, but on this picture? A. Yes, sir.

Q. If you counted that, one, two, three, four—well, three or four. A. Yes, sir.

Q. Was this post knocked down in this accident?

(Testimony of Robert Russell Harris.)

A. Yes.

Mr. Wilmer: Just a moment. If it please the Court——

The Court: The objection is sustained. The jury will disregard the last answer.

Q. (By Mr. Palmquist): But anyway, do you recognize this as being a position in relation to where the trailer ended? A. Yes, sir.

Q. And that is looking westerly, is it not?

A. Looking from this direction, yes, sir, westerly.

Q. Of course the trailer has been moved?

A. Yes, sir.

Q. Is that a true photographic representation of that place where this accident happened, as it existed at the time of the accident?

A. Yes, sir.

Mr. Palmquist: We will offer Plaintiff's Exhibit 4 [99] in evidence at this time.

Mr. Wilmer: Would you read back that last question and answer?

(The last question and answer were read.)

Q. (By Mr. Wilmer): You are testifying of your own knowledge this is how that place looked when the accident happened and you weren't even there?

A. This is after the truck had been removed, sir.

Q. The question was whether or not this is a true representation of the appearance at the time of the accident; you said yes.

(Testimony of Robert Russell Harris.)

A. He said after the truck had been removed.

(The previous question was read as follows:  
“Is that a true photographic representation of that place where this accident happened as it existed at the time of the accident?”)

A. Well, I understood the counsel to say after the truck had been removed.

Mr. Palmquist: I had said something about the truck having been removed.

Mr. Wilmer: I don't have any objections. It doesn't make any difference.

The Court: It may be received.

(Plaintiff's Exhibit 4 marked in evidence.)

Q. (By Mr. Palmquist): Plaintiff's Exhibit 4 now in evidence is a picture, is it not, taken after the trailer had [100] been removed back there and looking right down the highway, isn't it?

A. Yes, sir.

Q. Past the curve, right?

A. Yes, sir. After the truck has been removed, sir.

Q. Yes, after the truck has been removed. I show you Plaintiff's Exhibit 12, which is the same place only looking in the opposite direction.

A. Northern direction, yes, sir.

Q. Yes. Now, I would like to call your attention to this curve to the right that is going toward Flagstaff.

A. Yes, sir.

Q. Just the opposite to the one the jury is now looking at. Is that the way that curve goes, uphill?

A. Yes, sir.

(Testimony of Robert Russell Harris.)

Q. If you are coming from Flagstaff you would come around an S turn in there before you would hit this turn, would you not? A. Yes, sir.

Q. And assuming a driver asleep, can you believe that he would ever reach this point in the highway?

Mr. Wilmer: Just a moment. If it please the Court, we object to the question as having no proper foundation, calling for a conclusion of the witness.

The Court: The objection is sustained. [101]

Q. (By Mr. Palmquist): Is this a correct representation under those circumstances?

A. Well, you can't see the S curve on the other end of this one.

Q. No. A. Yes, sir.

Q. As far as it shows?

A. Yes, as far as it shows.

Q. This is after the truck is removed?

A. Yes, sir.

Mr. Palmquist: All right, we will offer this, if your Honor please.

Q. (By Mr. Wilmer): This is looking on toward Flagstaff, is it?

A. Which one is this now?

Q. This one that has just been identified, Plaintiff's Exhibit 12, this is looking toward Flagstaff?

A. Could I see it again?

Q. Surely.

A. Yes, sir, that is looking toward Flagstaff.

Q. As you say, at the point where the truck was standing as you saw it and looking toward the east?

A. The truck has been removed.



(Testimony of Robert Russell Harris.)

Q. I saw where the truck was standing and looking toward the east toward Flagstaff. [102]

A. Yes, sir.

Mr. Wilmer: We have no objection.

The Court: It may be received.

(Plaintiff's Exhibit 12 marked in evidence.)

The Court: Let's proceed, counsel.

Mr. Palmquist: I have no further questions of this witness.

Cross-Examination

By Mr. Wilmer:

Q. Mr. Harris, if I may, briefly, see if I understand your testimony. When you first arrived you were signaled by some unknown person by flashlight and drove up and made a U turn?

A. Yes, sir.

Q. And stopped? A. Yes, sir?

Q. With your lights shining on the side of the vehicle where the physical damage was or on the opposite side?

A. On the opposite side at that time, yes, sir.

Q. You were the first person there, were you?

A. No, sir. The person that waved us down with a flashlight, I don't know who it was or what it was, but there were lights at the scene of the accident when we got there.

Q. There was a car there?

A. There were lights of some kind. I don't know whether it was a car or truck. [103]

(Testimony of Robert Russell Harris.)

Q. You don't know whether there was a car there or not?

A. I don't know whether it was a car or truck, but there was some vehicle there.

Q. How many people were there, do you recall?

A. At the time in the immediate——

Q. When you first got there, when you drove up and stopped your vehicle how many people were there?

A. In the vicinity of that vehicle, that Hudson?

Q. Yes.

A. There was no one there at that Hudson at that time except the girl that was standing on the outside.

Q. Except the people that were in the car or had been in the car?

A. Yes, sir.

Q. How soon did anyone arrive?

A. Sir, I don't know. After I observed this I asked my wife if she wanted me to go get the ambulance. I took off to get the ambulance and when I got back there were some people there.

Q. Between the time you got there and the time you left for the ambulance what did you do?

A. The only thing I could do. I asked her how bad they were and should I go get an ambulance; she said yes. I got back in my car, I turned it around and left for the Ordnance Depot. [104]

Q. You left immediately?

A. Yes, sir.

Q. When you came back you had driven approximately what, five or six miles round trip?

(Testimony of Robert Russell Harris.)

A. I would say close to eight miles round trip, sir.

Q. Did you spend any time at the Ordnance Depot or did you turn immediately around and come back?

A. I got the driver to get out of bed and get the ambulance. I told him what had happened, that we had an accident, and I woke him up and he dressed—he was dressed when I got out there, but I left immediately to go back to the scene of the accident. I told him it was on the way to Flagstaff.

Q. How many people were there when you got back there?

A. I don't know how many people were there when I got back there.

Q. Quite a few?

A. I couldn't say, sir, because I was involved then in helping my wife straighten up one of the people that was in the car.

Q. Had the ambulance arrived yet or the coroner?

A. No, sir, they had not.

Q. Had the Patrol arrived?

A. Not when I first got back the second time.

Q. How quickly did the Patrol arrive?

A. I don't remember, it must have been, judging, maybe five [105] or ten minutes.

Q. How quickly did the ambulance arrive?

A. Well, the government ambulance arrived before the civilian ambulance did.

Q. Well now, in relationship to the time you got

(Testimony of Robert Russell Harris.)

back there how quickly did the government ambulance arrive?

A. I would say between five and eight minutes.

Q. How quickly did the civilian ambulance arrive?  
A. I couldn't say, sir.

Q. During this time you were helping your wife attempting to take care of the injured and dead people, is that right?

A. Yes, sir; before our ambulance got back?

Q. Yes. A. Yes, sir.

Q. Then when your ambulance arrived had the Patrol arrived at that time?

A. I don't think it had, sir.

Q. Are you sure of that?

A. No, sir; I am not sure, but I don't think it had.

Q. How quickly did traffic start backing up along the highway?

A. There was traffic already backed up, not too many.

Q. Quite a number of people around?

A. No, sir; I don't think there were so many people around at that time. [106]

Q. How many cars would you say were backed up there when the Patrol arrived?

A. I couldn't say.

Q. Were there as many as twenty?

A. I still couldn't say.

Q. You don't know?

A. No, sir: I don't know.

(Testimony of Robert Russell Harris.)

Q. After the Patrol arrived the fire truck from the city of Flagstaff arrived, did it not?

A. I believe the fire department arrived first.

Q. That is your recollection, is it?

A. Yes, sir.

Q. After the fire department arrived what did it do?

A. It started spraying some kind of liquid on the place where the gasoline was running out of the Hudson.

Q. How large an area of the highway did it cover with this liquid?

A. You mean the fire department?

Q. Yes.

A. Well, I would say from twelve to twenty feet, sir.

Q. Did it cover the pavement from north to south also?

A. He sprayed it under the Hudson and then right straight on across the highway.

Q. Taking east and west, arbitrarily, since they are not true east and west, how much of the pavement east and west [107] would you say he sprayed with that material?

A. I would say between twelve and twenty feet.

Q. As much as thirty feet?

A. I don't know, sir. I don't believe it would have gone thirty feet.

Q. That covered substantially the entire black top area, did it not?

A. I think it covered some to the east, that is



(Testimony of Robert Russell Harris.)

going toward Flagstaff, some of the concrete itself, sir.

Q. From the car, where the Hudson car was stopped eastward, how far, to your best recollection, did the fire department spray this material?

A. Well, sir, it sprayed it—I don't know whether it was coming from the gas tank or gas line——

Q. I am asking you how far from the car, taking the car as the westerly beginning point.

A. Yes, sir.

Q. How far easterly along the highway did they cover the highway with this material, this solution?

A. I don't know, sir, between twelve and twenty feet.

Q. In other words, I take it, the Hudson car was the westerly starting point for the spraying of the pavement?

A. Not exactly. They went beyond the stopping point of the front of the Hudson.

Q. How far did they go? [108]

A. I would say between four and five feet.

Q. Starting four or five feet west of the westerly part of the Hudson and to the east they covered the entire highway with this solution, did they not?

A. I would say yes, sir.

Q. It was under pressure, was it not?

A. I think so, yes, sir.

Q. It was a forced solution that was sprayed on the pavement with considerable force?

A. As near as I could tell from the man that was doing it it was sprayed with some force.

Mr. Palmquist: I would like to advise counsel

(Testimony of Robert Russell Harris.)

through the Court that we have the man here that did that work under subpoena.

Mr. Wilmer: I am very well aware of that, your Honor.

The Court: Proceed with your cross-examination.

Q. (By Mr. Wilmer): Then the broom was used, was it not, to scrub the surface of the highway? A. Sir, if it was I didn't see it.

Q. You didn't observe that? A. No, sir.

Q. There was a considerable amount of confusion around there at the time, was there not, a lot of traffic and a lot of people getting around smoking and causing considerable concern as to the possible effects of a fire? [109]

A. There were some people that were smoking and it was causing concern of myself and my wife too they did not catch that on fire before the fire department got there.

Q. I am speaking of after you returned, Mr. Harris; for that hour of the morning there was a very large amount of traffic and considerable amount of people around the scene as curious onlookers always gather? A. There were some, yes, sir.

Q. It was not until the next morning, Mr. Harris, that you went out there to make a careful examination of the scene of the accident?

A. That is true, sir.

Q. You did not make a sufficient examination the evening you were there you were satisfied with?

A. No, sir.

(Testimony of Robert Russell Harris.)

Q. Did you have any official connection with the making of this investigation? A. No, sir.

Q. Now, do I understand from your testimony, Mr. Harris, that you have from the things you have observed in Plaintiff's Exhibits 19 and 19-A——

A. All this observing was the next morning at daylight.

Q. Yes. A. Yes, sir.

Q. Based upon the things you saw there as reflected in [110] 19 and 19-A, you have put upon the board, whatever that exhibit is, the big one back there.

Mr. Scoville: Three.

Q. (Continuing): Plaintiff's Exhibit 3, red lines which you say indicate tire marks which you saw? A. Yes, sir; as close as I could draw it.

Q. Your clear recollection is those tire marks extended from westerly of the nose of the Hudson, beginning westerly from the nose of the Hudson you could trace them across the pavement to where the trailer had stopped? A. Yes, sir.

Q. How far west of the nose of the Hudson would you say they began?

A. I don't remember, sir.

Q. Would it be as much as you have indicated here of four feet?

A. It could be more than four. It could be I think more than four, maybe less than four.

Q. Is it your testimony those marks were very clearly discernible from the point west of the place the Hudson was resting that evening on the pavement to where the trailer was standing?

(Testimony of Robert Russell Harris.)

A. Not in the evening, sir, I couldn't see it.

Q. Pardon? I say the following morning. Is it your testimony these marks were clearly [111] discernible?

A. Yes, sir, the next morning they were.

Q. From where the Hudson had been that morning at 3 o'clock you saw it?      A. Yes, sir.

Q. On to where the trailer stood?

A. Yes, sir.

Q. And that is reflected in these pictures here?

A. Yes, sir.

Q. Had you made any examination, Mr. Harris, of the pavement any time prior to the 10th of July, 1955, in that area, I mean a careful examination?

A. No, sir, but I have gone over that area frequently.

Q. No, the question I asked you, Mr. Harris, if you had made a careful examination such as stopping your car, getting out and examining the pavement?      A. No, sir.

Q. You have no knowledge then as to the marks or gouge marks that may or may not have been in the pavement prior to the accident?

A. The gouge marks I know nothing about.

Q. You saw no gouge marks?

A. The only thing I saw was the continuous tire tracks from the point I indicate, four to eight feet or less, to where the truck stopped to rest. The gouge marks I didn't notice.

Q. This personal property, things of that character you [112] testified you saw——



(Testimony of Robert Russell Harris.)

A. The personal property?

Q. Yes. A. Or contents of the car?

Q. Yes, contents of the car or trailer?

A. Yes, sir.

Q. They were from that point where the Hudson was at rest easterly toward Flagstaff?

A. There was some, the glass, and there was some contents down to the left of the car there.

Q. Down to the left of the Hudson car?

A. Yes, sir. Right in there.

Q. Right in this area, which is easterly——

A. To the easterly, right, sir.

Mr. Palmquist: Could we have that marked?

Q. (By Mr. Wilmer): Was it close to the car?

A. Yes, sir, there was some close to the car. In fact, I could get to this side of the car and I did look at the occupant under the steering wheel there; and I had no trouble getting up to it.

Q. You had no trouble because of the debris on the pavement? A. That is right, sir.

Q. Am I to understand from that there was a substantial amount of debris here and not much back toward the east?

A. That is right. I don't remember seeing very much over [113] ten feet behind the car.

Q. Ten feet to the east?

A. Yes, sir. That is on the highway, but there was some off on the shoulder.

Mr. Palmquist: Could we have the witness mark it, your Honor?



(Testimony of Robert Russell Harris.)

Mr. Wilmer: We will put a circle here.

Mr. Palmquist: I would rather the witness make the circle rather than counsel.

Mr. Wilmer: On redirect examination you can do it.

Q. (By Mr. Wilmer): I have placed an orange circle. A. Yes, sir.

Q. Does that look about right?

A. If the occupant which is driving the automobile——

Q. If you would care to step down.

A. This is going to be the front of the automobile?

Q. You drew it; I am assuming you knew it.

A. I can step right in here without any trouble at all, but there was debris back over here, not to excess.

Q. When you say "Over in this area" you have drawn a straight line from the circle in a **north-**easterly direction? A. Yes, sir.

Q. Now, in relationship, Mr. Witness, to the black top are you conversant with the fact these two lines have been drawn here as indicating the general black top area? [114] A. Yes, sir.

Q. Is it your statement the Hudson when you saw it that evening was at the extreme easterly edge of that black top area? A. The easterly?

Q. Yes.

A. Yes, sir, it was on the edge of that black top and it was there——

Q. Was it on the easterly edge or westerly edge?

(Testimony of Robert Russell Harris.)

A. On the easterly edge.

Q. In fact, just the front end was on the easterly edge? A. Well, I would say yes, sir.

Q. Where with respect to the Hudson, if you remember, that evening was the two-wheel trailer?

A. I didn't see that until the next morning, sir.

Q. You don't know where it was that night?

A. No, sir, I don't.

Q. Where did you see it the next morning?

A. It was over in the field beyond the rear end of the Hudson.

Q. In relationship to the culvert and that area where was it?

A. I couldn't say exactly because I don't remember where it was, sir.

Q. With respect to a point directly north, rather directly [115] northeasterly—

Mr. Palmquist: I have a picture of it here, counsel.

Mr. Wilmer: I would appreciate it if I can go ahead with my cross-examination.

The Court: Don't interrupt counsel.

Mr. Palmquist: All right.

Q. (By Mr. Wilmer): Referring to a point directly northeast of the northeasterly edge of the Hudson, now from that point how far would you say the two-wheel trailer was that next morning when you saw it, either to the east or to the west?

A. I would say it was to the west of that.

Q. And how far? A. I don't remember, sir.

(Testimony of Robert Russell Harris.)

Q. You went out to investigate the matter and make some investigation?

A. At the same time I was helping pick up the personal effects.

Q. I am speaking of the next morning.

A. That is what I am talking about.

Q. What is your best recollection then, Mr. Witness, as to where the two-wheel trailer was the next morning?

A. I would say five, maybe eight feet to the left of that line.

Q. Five to eight feet further westerly? [116]

A. Yes, sir.

Q. That is your recollection?

A. That is approximately, yes, sir, my recollection.

Q. The evening when you were there and made certain casual, I believe, observations——

A. The evening?

Q. The morning after, I am sorry.

A. Yes, sir.

Q. Is it your statement now you clearly recall there was not any substantial amount of debris more than ten feet east of where the Hudson was?

A. It is my recollection, yes, sir.

Q. To your recollection? A. Yes, sir.

Mr. Wilmer: We have no further questions.

(Testimony of Robert Russell Harris.)

### Redirect Examination

By Mr. Palmquist:

Q. Counsel has said when you went out there to investigate the accident. Did you go out there to investigate the accident at 6 o'clock that morning, three hours after this happened?

A. We didn't go to investigate, we went to satisfy ourselves about some things we had talked about and thought about from the time we left the hospital where the patient was left until that morning. [117]

Q. You said you were going out to pick up some personal effects?

A. No, sir. We arrived there, see. They hadn't cleared the personal effects; my wife and myself both helped load them on a vehicle that was furnished by the city of Flagstaff or court of Flagstaff to do things like that.

Q. You were picking up the personal effects?

A. Yes, sir.

Q. Now, was there some difficulty in getting some of the injured people out of the car?

Mr. Wilmer: Objected to as being immaterial, if the Court please.

Mr. Palmquist: Well, this may become significant.

Mr. Wilmer: Until it becomes significant.

Mr. Palmquist: Well, we won't have this witness here, if Your Honor please.

(Testimony of Robert Russell Harris.)

Mr. Wilmer: I am sorry, but there has been no foundation.

Mr. Palmquist: I withdraw the question and will get at it this way.

Q. (By Mr. Palmquist): Mr. Harris, when you arrived there you found one girl out of the car?

A. Yes, sir.

Q. Do you know which one of the girls that was?

A. It was the oldest of the three that occupied the car, [118] oldest of the three children.

Q. Oldest of the three that occupied the car, Norma? A. Yes, sir.

Q. Do you know who was driving the car, who had been driving the car?

A. Mr. Sanders was driving the car.

Q. Do you know where Mrs. Sanders had been seated?

A. No, sir, I don't know where she was seated but I know what position she was in after I came back.

Q. Yes. What was her position?

A. Her feet was toward the south side of the highway and her head was over on the north side of the car.

Q. In which seat, front seat?

A. She was in the rear, yes, sir, rear seat.

Q. Was she on the right side or left side of the car?

A. Well, she was laying across the whole works of the car there.

Q. In the back?



(Testimony of Robert Russell Harris.)

A. Yes, sir, as near as I could tell.

Q. I see what you mean. Then were there some other girls in the car?

A. Well, at the time, at this time I went on to the Depot; when I got back the two girls, the one that was outside the car and the other girl that was in the front seat had departed for the hospital. But the one we took back to the Ordnance [119] Depot was laying in the back seat. And some of the personnel there had got it rested and on its back, the one we admitted to our hospital at the Depot.

Q. Which one was that of the girls?

A. That was the middle, the one that was thirteen.

Q. Wanda?

A. Yes, sir, Wanda was the name.

Q. Was she still in the car when you came back?

A. Yes, sir.

Q. Was there some difficulty in removing her from the car?

A. Well, the only difficulty was it was kind of dead weight and unhandy to get to her to get her on the stretcher to put her in the ambulance.

Q. Was there a tow truck using a cable to pull doors open on that car?

A. Sir, not while I was there. If it was I didn't see it.

Q. Do you know whether or not anyone had used boards to try to pry doors open?

A. If they did I didn't see them while I was there, no, sir.

Mr. Palmquist: I have no further questions.

Mr. Wilmer: That is all.

(Witness excused.)

The Court: At this time, gentlemen, we will take a recess until 10 o'clock tomorrow morning. Please be here promptly at that time and please bear in mind the admonition [120] heretofore given you.

(Whereupon, a recess was taken at 4:30 o'clock p.m. until 10 o'clock a.m. Friday, August 5th.)

The Court: You may proceed.

Mr. Scoville: Your Honor, at this time I would like to offer a certified copy of the letters of administration of Ralph Wanek, of the estates of Herbert N. Sanders and Delphia F. Sanders, out of the Superior Court of the State of Arizona in and for the County of Coconino, certified as having been issued to Mr. Wanek on July 12, 1954; and letters of special administration in cause 2408 of that Court and attested to by the clerk of that Court on August 3, 1955, as having been and still being in full force and effect.

Mr. Wilmer: It was not my recollection that the suit was as special administrator, Your Honor.

Mr. Scoville: The suit simply states, I believe, he is the administrator. It doesn't designate him as being general or special. Under the laws of the State of Arizona the special has all the powers of a general.

Mr. Wilmer: If it please the Court, we object

on the ground the action is not brought by a special administrator and hence the letters or purported letters of special administration would be immaterial; secondly, on the ground the special administrator would have no jurisdiction in prosecuting this action. [121]

Mr. Scoville: Under the laws of Arizona a special administrator may prosecute claims and/or sue or be sued.

Mr. Wilmer: There is a specific statute on wrongful deaths, Your Honor, that does not apply to a special administrator.

The Court: It will be received. I will hear you on your other points in regard to it at another time.

Mr. Wilmer: Very well.

(Plaintiff's Exhibit 21 marked in evidence.)

### GLENN FLAKE

called as a witness herein, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Scoville:

Q. Will you state your name to the Court and jury?      A. Glenn Flake.

Q. Mr. Flake, where do you presently reside?

A. Snowflake, Arizona.

Q. Have you heretofore held a position with the Highway Patrol of the State of Arizona?

A. Yes, sir.

Q. And in what capacity?      A. Patrolman.

(Testimony of Glenn Flake.)

Q. And were you such patrolman on July 10, 1954? [122] A. Yes.

Q. Mr. Flake, where were you stationed?

A. Flagstaff.

Q. And how long have you been stationed at Flagstaff or how long were you stationed at Flagstaff, approximately?

A. Just about a year.

Q. Now, what area were you assigned to and in which you performed your duties?

A. All directions out of Flagstaff, all four highways leading out.

Q. Are you presently working as a patrolman?

A. I am on inactive duty now recuperating from an accident.

Q. I believe you were involved in an accident, the result of which you have been off of active duty for a considerable length of time, is that right?

A. Yes, sir.

Q. Now, Mr. Flake, directing your attention to the date I mentioned, July 10, 1954, did you have occasion to go to the scene of an accident approximately seven and one-half miles west of Flagstaff, an accident in which one Herbert Sanders and his wife Delphia Sanders had been killed?

A. Yes, sir.

Q. Do you recall the occasion?

A. Yes, I do.

Q. Now, what were the circumstances, did you go to the [123] scene of that accident?

A. Yes, I did.

(Testimony of Glenn Flake.)

Q. And was yours the initial call as patrolman?

A. No.

Q. What sort of call did you get?

A. A follow up.

Q. And by "follow up" I take it you were following up the first officer dispatched?

A. Yes, investigating officer.

Q. To investigate the accident. Do you recall where you were, were you in Flagstaff or were you east or west of the scene?

A. No, I was home in bed at the time.

Q. You were home in bed at the time?

A. Yes, sir.

Q. Now, you stated you went to the scene of the accident?      A. Yes, sir.

Q. Do you have any recollection as to the approximate time that you departed from your home to go to the scene? Do you know approximately what hour it was?

A. Well, I don't know that I would be able to pin it down too close. I would say somewhere around 5 o'clock, between 4 and 5 o'clock, as I recall it from here. I didn't make any note of the time or anything.

Q. You had no reason—at least it was in the early [124] morning hours?

A. Yes, that is true.

Q. On the way out did you have occasion to pass or to see fire equipment of the city of Flagstaff?

A. Yes, sir.

Q. What kind of vehicle was that?



(Testimony of Glenn Flake.)

A. It was a pickup.

Q. And was it equipped with any special equipment?

A. Yes, it had hoses with water tank. I suppose that was the water they were carrying. It was a built-in job.

Q. Carrying a red light, too?

A. Yes, sir, it had a red light.

Q. Where did you first see the fire truck, approximately?

A. Soon after I left Flagstaff. It was ahead of me on the road.

Q. Did you pass the fire truck?      A. I did.

Q. Did you arrive at the scene of this accident before the fire truck arrived?      A. Yes, I did.

Q. Now, tell us upon arrival at the scene what vehicles you found there had been incapacitated in some fashion.

A. There was a touring car that had been pulling a luggage trailer. I believe it was a Hudson, from my recollection, heading, had been heading in a westerly direction. [125]

Q. That is the passenger car was going away from Flagstaff?      A. Away from Flagstaff.

Q. Going west?      A. Going west.

Q. And what other vehicle did you find there?

A. Found a large truck, I believe it was a Mack tractor and trailer.

Q. It was headed and had been headed in what direction?

A. Had been headed in an easterly direction.

(Testimony of Glenn Flake.)

Q. Can you, without getting down from the witness chair, can you see this plat which is Plaintiff's Exhibit 3? A. Yes, I can see it.

Q. Now, you have said that the passenger car was headed in a westerly direction, which on this plat would be to my left, is that correct?

A. That is correct.

Q. Where my left hand is pointed. And going away from Flagstaff? A. Yes, sir.

Q. And the truck is an easterly direction towards Flagstaff? A. Yes, sir.

Q. The pavement at that portion of the highway and at that time was of what type?

A. Well, there is two types of construction. The center part is concrete and the outside is oil type construction. [126] There is a shoulder built on each side of the old pavement.

Q. The old Portland cement pavement?

A. Yes.

Q. In order to fix this in our minds, the north one-half of that pavement would be for vehicles traveling in what direction?

A. In a westerly direction.

Q. For vehicles going west it would be the proper lane? A. Yes.

Q. And the south one-half of the pavement for vehicles traveling what direction? A. East.

Q. That would be toward Flagstaff?

A. Toward Flagstaff.

Q. You have told us there was a passenger car

(Testimony of Glenn Flake.)

there at that time and place. You recall there is a culvert at that point, approximately?

A. Just from my own recollection I didn't recall particularly a culvert there. However, after seeing evidences from the scene it has recalled it to my memory.

Q. I showed you the pictures this morning?

A. Yes.

Q. You do now recall there was a culvert there?

A. Yes.

Q. Incidentally, you were not the officer who wrote the [127] investigation in this matter?

A. No, I was not.

Q. Can you tell us from your best recollection approximately where the Hudson automobile was resting when you arrived?

A. I would say it was about half on the oil construction and half on the cement construction of the highway on the north side of the center line.

Q. If it were north of the center line it was at that time in the proper lane for vehicles traveling in that direction, is that right?

A. That is correct.

Q. Can you tell us—you have said it was approximately half on the cement and half on the shoulder, would that be the north shoulder?

A. On the north shoulder, yes.

Q. At that time was the vehicle occupied?

A. Yes, it was.

Q. Will you tell us just briefly what the occupancy of that vehicle was, as you remember it?

(Testimony of Glenn Flake.)

A. There was a man in the driver's seat that was dead at the time. He was pinned in his seat. And there was a woman in the rear seat of the vehicle.

Q. Did you also see some other persons who had been in the vehicle or were still in the vehicle? [128]

A. I did not see them at the time.

Q. At that time you did not?

A. No, I didn't.

Q. What duties did you perform?

A. Well, I helped direct traffic when I first got there and as we removed the woman from the vehicle I assisted in taking her from the rear seat of the vehicle, putting her in the ambulance; and later helped remove the gentleman from the front seat.

Q. On your arrival at this scene and observing the Hudson automobile, as you told us you saw it, did you observe in and about that location at any place any debris such as dropped dirt, broken glass, things of that sort?

A. Yes, sir.

Q. Where was that debris located with reference to the center line of the highway, was it to the south for vehicles traveling to Flagstaff or was it in the north lane for vehicles traveling away from Flagstaff?

A. It was in the north lane.

Q. It was in the north lane?

A. It was in the north lane, yes.

Q. Was that before the fireman washed it away?

A. Yes, sir.

Q. Now, I have not asked you about the Mack



(Testimony of Glenn Flake.)

truck. Can you tell us approximately, from your own recollection [129] approximately where the Mack truck was standing at the time of your arrival?

A. It was off on the north side of the road completely off the highway, off, I would say, just estimating it, at one hundred yards to the east of the accident scene.

Q. Now, did you remain at the scene for some length of time, Mr. Flake?      A. Yes, sir.

Q. How long did you stay, with reference to darkness and daylight?

A. I was still there after it come daylight.

Q. What was your purpose in remaining at the scene from that time until daylight, or what were your several purposes?

A. The investigating officer had left the scene to go into town to attend to further investigation of the accident and I stayed to guard the scene to see that nothing was molested in the trailer or truck or see nothing was removed from the highway that would be of——

Q. Then you were there continually from the time you arrived until the daylight hours, is that correct?      A. Yes, I was.

Q. Did you during that time protect the scene that you have described?      A. Yes, I was.

Q. Were photographs taken then after daylight? [130]      A. Yes, they were.

Q. By whom?

A. Roy Bryfogle, the other investigating officer.



(Testimony of Glenn Flake.)

Q. The other Highway Patrol?

A. Yes, sir.

Q. Did the scene remain the same from the time you arrived, except for the washing of the debris away by the fireman, until the pictures were taken? How did you route your traffic?

A. I routed the traffic on the south side of the road. However, there were pictures taken before the vehicle was moved and after the vehicle was moved both.

Q. During the nighttime I believe there were some pictures taken?

A. There were some pictures taken during nighttime. And after it became daylight there were additional pictures taken.

Q. I will show you what has been marked Plaintiff's Exhibit 16 in evidence, I believe. Do you recognize that picture? A. Yes, sir.

Q. And of what is it a picture?

A. The Hudson car we had reference to earlier.

Q. Is that the way it appeared in the nighttime when you arrived, substantially at least, to the best of your recollection?

A. Yes, to the best of my recollection that is the way it [131] appeared.

Mr. Palmquist: What was that exhibit, counsel?

Mr. Scoville: 16.

Q. (By Mr. Scoville): I will show you also what is Plaintiff's 15. You recognize that picture?

A. Yes, sir.

Q. And is it a picture of the Hudson?

(Testimony of Glenn Flake.)

A. Yes, it is.

Q. Taken at the same time? A. Yes, sir.

Q. Now, directing your attention to some of the pictures taken after daylight hours. I will show you Plaintiff's 19 and ask you to examine that picture. That is in evidence at the present time. Do you recognize the objects in that picture?

A. Yes, sir.

Q. Is that at the scene? A. That is.

Q. Is that the scene as it appeared that morning? A. Yes, it is.

Q. I will direct your attention to a patrol car in the foreground between the point where the picture was taken and the truck. Was that your patrol car, do you recall?

A. The vehicle assigned to me, yes.

Q. That was the vehicle assigned to you. Now, I direct your attention to various tracks appearing in that picture on [132] the north side of the highway, marked, and in Plaintiff's 19-A in evidence, an enlargement of the same scene. Now, will you tell us if those marks as shown in that picture on that pavement were present at the time you were there?

A. Yes, sir.

Q. Now, at the time the firemen arrived what did they do?

A. In the accident there was quite a large quantity of gas spilled on the highway and they were washing the gas from the highway keeping it from igniting from any spark or something that might be left from the scene.

(Testimony of Glenn Flake.)

Q. Did you observe where the gas came from?

A. I would say from the Hudson car. It was mostly in and around the Hudson vehicle.

Q. Where they washed was that mostly around and under the Hudson? A. Yes, sir.

Q. Now, I am not sure whether I asked you, was there a luggage trailer that had been attached to the Hudson? A. Yes, sir.

Q. Did you observe anything in the way and about in the way of personal property, personal effects that had come from the luggage trailer?

A. Yes. As we went to clean it up I noticed some of the things that were there, as we were gathering some of the things back together. [133]

Q. What were they, did you notice?

A. I noticed particularly there were some children's toys, little doll buggies, things like that. We commented on that at the time.

Mr. Scoville: You may cross-examine.

Mr. Wilmer: Mr. Scoville, was there a picture identified and not put in?

Mr. Scoville: I didn't identify any pictures.

Mr. Wilmer: Didn't you show him one taken in the morning?

Mr. Scoville: I have shown him these I have laid down.

The Court: All those counsel examined about are in evidence.

Mr. Scoville: These are the only ones I examined him about, Mr. Wilmer. Would you pardon

(Testimony of Glenn Flake.)

me, Mr. Wilmer. Counsel has pointed out to me one thing I overlooked that perhaps I should ask on direct examination. May I proceed?

Mr. Wilmer: Surely.

Q. (By Mr. Scoville): There are a few pictures perhaps we haven't identified. I would like to with this witness, if the Court would bear with me just a moment.

Mr. Palmquist: Counsel, why not offer all the Highway Patrol pictures?

Mr. Scoville: Yes. I am sorting those, Mr. Palmquist, that were not taken by the Highway Patrolman.

Q. (By Mr. Scoville): Mr. Flake, let me show you what is Plaintiff's Exhibit 20. I will ask you to look at that [134] picture. Do you recognize the scene displayed in that photograph?

A. Yes, sir.

Q. And of what is that a picture?

A. That is a picture of the same Hudson that was in the accident earlier that morning.

Q. That is another picture of the scene you have described with reference to the other photographs as it existed on the early daylight hours of July 10, 1954?

A. The vehicle had been moved from the original——

Q. Which vehicle had been moved?

A. The Hudson vehicle had been moved.

Q. Moved from the highway?

A. Moved from the highway where it came to rest.



(Testimony of Glenn Flake.)

Q. That had been moved by whom, do you recall?

A. I think it was Caffey's Auto Salvage, a fellow by the name of Veazey was the driver of that.

Q. Other than the removal of the Hudson from the highway by the garage man is the scene the same as it appeared prior to its removal at the time you were there in the morning?

A. Yes, sir.

Mr. Scoville: We offer Plaintiff's Exhibit 20.

Mr. Wilmer: We have no objection.

The Court: It may be received.

(Plaintiff's Exhibit 20 marked in evidence.) [135]

Mr. Scoville: Mr. Wilmer, in the interest of saving time might I show these to you first?

Mr. Wilmer: I take it there are not being tendered to the witness?

Mr. Scoville: I was going to tender them through the witness because I am advised he can identify the photographs and I thought perhaps Mr. Wilmer had seen the patrolman—these same photographs. I am trying to save time.

Mr. Wilmer: To these we have no objection, but as to others we believe there has been no foundation laid and as previously indicated there has been no showing in the matter that the condition of the pavement was the same at the time these pictures were taken as it was at the time of the accident, and not referring now to specific markings, referring to general markings on the pavement.

Mr. Scoville: If Your Honor please, this wit-



(Testimony of Glenn Flake.)

ness testified a few moments ago he remained there throughout the morning hours——

The Court: There is nothing before me now. If counsel can't stipulate that is that.

Mr. Wilmer: May I ask the witness a question for the purposes of this stipulation?

The Court: Very well.

Q. (By Mr. Wilmer): Mr. Flake, prior to the time or subsequent to the time the Hudson automobile was moved off the [136] pavement, I believe that was during the nighttime, was it not?

A. Yes, it was before it had become daylight.

Q. It was set off the pavement first, then later taken into town?           A. Yes, sir.

Q. After it was removed from the pavement then there was the normal flow of traffic on both lanes of the pavement, was there not?

A. I was there protecting them from going over the debris and things that were on the north side of the road. There was quite a lot of glass, chrome, things like that on the road.

Q. Now, when the fire truck washed the pavement, Mr. Flake, was there not at that time removed from the general area there everything that was on the highway and wasn't there a broom used to sweep off the highway?

A. I don't recall anyone using a broom. There could have been. I didn't notice.

Q. Do you know the name of the man—maybe this is cross-examination, Your Honor. I think I am going beyond what is proper voir dire.

(Testimony of Glenn Flake.)

Without being committed by the stipulation to the fact that all these various things that appear on here were the result of the accident or related to the accident, we will agree that Mr. Flake will testify these do represent the scene as he saw it that morning. We do object, however, to two of [137] the proposed pictures, not on the basis of improper foundation but upon the basis that they are immaterial and serve no purpose.

Mr. Scoville: At this time the two you refer to I will withdraw.

Mr. Wilmer: To save time, I am sure Mr. Flake would testify these represent the scene as he saw it that morning. Therefore I think we can save time. Yes, to those we are willing to have them admitted on that basis if that is agreeable.

Mr. Palmquist: Will you remove those typewritten slips from the back?

Mr. Scoville: Yes, I will.

The Court: They may be received.

Mr. Scoville: Because they will be referred to, if Your Honor please, from time to time individually if we might mark them consecutively.

The Court: All right, they may be marked beginning with number 22.

(Plaintiff's Exhibits 22 to 34, inclusive, marked in evidence.)

Q. (By Mr. Scoville): Now, Mr. Flake, you have mentioned heretofore the truck that was there

(Testimony of Glenn Flake.)

at that time and place. I will show you Plaintiff's Exhibit 26 in evidence; do you recognize the vehicle?

A. Yes, sir. [138]

Q. And is that the truck? A. That is.

Q. I believe at this time a wheel had been removed, is that right, do you recall?

A. Yes, sir.

Q. Referring to Plaintiff's 27, is this the Hudson automobile? A. Yes, sir.

Q. And was that after it had been removed from the highway? A. Yes, sir.

Q. And the foreground of the picture is the right side of the Hudson, is it not? A. Yes, sir.

Q. Not the driver's side? A. No, sir.

Q. That is the off side? A. Yes, sir.

Q. I will show you Plaintiff's Exhibit 20. Do you recognize that portion of the truck?

A. Yes, sir.

Q. Now, there appears to be some metal, there is metal down under the edge of the wheels, appears to be pushed up under the truck. Do you recall what that was?

A. That was the left front fender and portion of the Hudson.

Q. Left front fender of the Hudson automobile? [139] A. Yes, sir.

Q. Was that under the truck when the truck stopped down here way off the pavement?

A. Yes, sir.

Q. Was that the left front fender of this Hudson automobile? A. Yes, sir.

(Testimony of Glenn Flake.)

Q. Then do you mean it had been carried all the way under the truck? A. Yes, sir.

Q. I show you another picture. Again is this the truck. This is Plaintiff's Exhibit 30, the truck and trailer, semi-truck? A. Yes, sir.

Q. Is it in position off the road as you have heretofore testified? A. Yes, sir.

Q. I show you Plaintiff's 31. Is that another view of your patrol car and the truck and the Hudson? A. Yes, sir.

Q. That is after the Hudson had been pulled down and off the road? A. Yes, sir.

Q. I show you Plaintiff's 32. Is that, too, also a correct picture of the truck and conditions at the time you observed [140] them? A. Yes, sir.

Q. Now, is this picture, number 32, is this looking at the back end, rear end of the truck from a position in here somewhere? A. Yes, sir.

Q. Now, of what is this a picture?

A. That is the Hudson that was involved in the accident.

Q. This is after it had been pulled from the highway, is it? A. Yes, sir.

Q. That is Plaintiff's 33.

I am referring to 34. Do you recognize that photograph? A. Yes, sir.

Q. For the sake of brevity that is another picture of the fender of the Hudson carried all the way under the wheels of the truck?

A. Yes, sir.

Q. I will show you what is marked Plaintiff's 25

(Testimony of Glenn Flake.)

for identification. Do you recognize that photograph?      A. Yes, sir.

Q. And that is a view, is it, from the front end of the truck looking back toward the west?

A. Yes, sir.

Q. Is it toward the west?

A. Yes, sir. [141]

Q. That is this view, Plaintiff's 25, is taken from a point about here looking back in this direction (indicating), is that correct?      A. Yes, sir.

Q. Referring to Plaintiff's 23, is that also a true and correct depiction of the scene as it existed?

A. Yes, sir.

Q. And this is another view, is it not, taken down in the area looking towards Flagstaff but including the Hudson automobile, after it had been removed by the wrecker?      A. Yes, sir.

Q. Now, I show you what has been marked Plaintiff's 28 for identification, and do you recognize that as being the photograph of the north half of the pavement?      A. Yes, sir.

Q. And would that be taken looking toward Flagstaff also?

A. Looking toward Flagstaff, looking toward the east.

Q. That is looking toward the direction from which the Hudson was coming?      A. Yes.

The Court: What number is that, Mr. Scoville?

Mr. Scoville: I am sorry, 28.

The Court: You called it 28 for identification. You meant 28 in evidence.



(Testimony of Glenn Flake.)

Mr. Scoville: 28 in evidence, I am sorry. [142]

Q. (By Mr. Scoville): I will show you two more, one is 22 in evidence. Do you recognize that also as another photograph of the scene taken that morning?

A. Yes, sir.

Q. If I am correct, for the benefit of the jury, this is looking in the direction in which the Hudson was traveling, is that correct?

A. Yes, sir.

Q. Looking west away from Flagstaff?

A. Yes, sir.

Q. The part of the road we see to the right of the picture—to the left part of the picture, that would be the north half of the pavement?

A. Yes, sir.

Q. That is the direction of travel of the Hudson?

A. Yes, sir.

Q. Now, I show you Plaintiff's Exhibit 24, in evidence. That is the same as the last photograph as to direction, is it, it is looking——

A. This is looking toward the north, kind of a cross-section of the highway.

Q. A cross-section toward the north. And the track marks here are also shown in the last exhibit just mentioned?

A. Yes, sir.

Q. Looking toward the north. You may cross-examine. [143]

Mr. Wilmer: Might I wait until the jury is through examining the pictures?

The Court: Surely.

(Testimony of Glenn Flake.)

Cross-Examination

By Mr. Wilmer:

Q. Mr. Flake, did you make a fairly close examination of the Hudson car that morning after it got light? A. Yes, I looked it over.

Q. Was that after it had been moved off the pavement and onto the side of the traveled portion?

A. It was moved off the pavement before it got light.

Q. That is what I mean. So it had been moved before you made a careful examination of it?

A. I looked it over quite thoroughly before it had been moved. The fellow was still in the vehicle.

Q. I realize that, but I am speaking now of looking at it with the opportunity of examining it carefully, with light and so on, that was after it got light you did that?

A. Yes, after it got light.

Q. Now, as I understand, Mr. Flake, the left front fender of the Hudson, which I presume included the apron, that is where it joined onto the hood, had been literally torn off the Hudson and carried under the truck to where the truck came to rest? A. Yes, sir. [144]

Q. Was that portion of the Hudson under the front end of the truck or was it carried to the back of the truck?

A. It was along about the middle. It wasn't to the rear of the truck or it wasn't under the tractor.

(Testimony of Glenn Flake.)

Q. As I understand this the truck consisted of a tractor with a fifth wheel and a refrigerated box, is that right? A. Yes.

Q. What I am asking you, was it under the tractor or was it under the box, under the refrigerated box, or do you remember?

A. From my recollection I would say it was behind the duals on the tractor.

Q. Behind the drivers? A. Yes.

Q. Did you make an inspection or examination of the tractor or the truck?

A. I looked it over, yes, sir.

Q. What did you observe with respect to the condition of the front wheels of the tractor?

A. Oh, if my memory serves me the front wheels were knocked out from under it, knocked underneath.

Q. The front wheels had been torn loose from their moorings and the front end hammered back almost to the drivers, were they not?

A. That is the way I remember it. [145]

Mr. Wilmer: Would you mark that for identification, please.

(Defendant's Exhibit A marked for identification.)

Q. (By Mr. Wilmer): In making your examination of the Hudson automobile did you make any examination to determine if there was any paint

(Testimony of Glenn Flake.)

marks upon the Hudson that you could ascertain came from any foreign source?

A. No, sir. I wasn't particularly looking for that.

Q. Let me show you Defendants' A, which I do not believe is in this series, but which appears to be a picture taken at the side of the road or at the scene of the accident. Looking at that, can you tell me if that appears to be a view of the Hudson looking directly at it from the side, the side of the damage?

A. Yes, sir.

Q. Now, can you tell me, Mr. Flake, if it is not a fact that the rear fender, rear left fender of the Hudson, was undamaged other than perhaps for—in other words, had not suffered any heavy portion of the impact?

A. There was some damage done to it from an earlier picture I looked at. You don't see too much damage from this picture.

Q. What I am trying to say, Mr. Flake, is this: Examining the Hudson automobile, if we would take one of these pictures here as representing the square vehicle and this representing the left front corner of the left side—— [146]

A. Yes, sir.

Q. Your damage was substantially like this, was it?

A. Yes.

Q. Now, in your examination of the damage to the tractor could you tell me, Mr. Flake, if you have a sufficiently clear independent recollection of the condition of these vehicles now apart from these pictures that you could tell us something about the

(Testimony of Glenn Flake.)

main portion of the damage to the tractor, or would you have to rely on these pictures to refresh your recollection as to the details of the damage?

A. I remember there was damage to the front wheels of the truck. I remember that from my own——

Q. They were torn loose?

A. Yes. Whether they were torn back or bent over I don't recall right offhand without looking at the pictures. There was damage to them and the front bumper was bent up on the left side.

Q. Let me ask you to look at this picture—I picked this up over here but apparently it isn't marked, or is it 30—which is numbered 30. I understand. Would you look at that, please, Mr. Flake, and tell me if it is not a fact or if that refreshes your recollection where you could say as a matter of fact the damage to the front end of the Mack truck was confined to bending back of the bumper, the left front of the bumper? [147]

A. I would say the left side bore the impact of it, if that is what you mean.

Q. Well, maybe I can show you another picture.

We would offer in evidence at this time Defendants' Exhibit A, if it please the Court.

Mr. Scoville: We have no objection to the receipt in evidence of Defendants' Exhibit A.

The Court: It may be received.

(Defendants' Exhibit A marked in evidence.)



(Testimony of Glenn Flake.)

(Defendants' Exhibit B marked for identification.)

Mr. Palmquist: We will stipulate to them all going in, anything you have.

Q. (By Mr. Wilmer): Mr. Flake, I want to show you Defendants' Exhibit B for identification and ask you to examine that and tell me if that refreshes your recollection as to the appearance of the front of the Mack truck? A. Yes, sir.

Mr. Wilmer: Then we offer it, and counsel has agreed it may be received in evidence. We offer it.

The Court: It may be received.

(Defendants' Exhibit B marked in evidence.)

Q. (By Mr. Wilmer): Had it been raining that night, Mr. Flake, or did it rain through the night?

A. I believe it did. As I recall it, it was kind of a damp morning. [148]

Q. Now, I believe that you stated that you had stayed there for the purpose of keeping traffic off the north side of the highway?

A. That is correct.

Q. Looking at 25, Plaintiff's 25, would you then tell me that the tracks and other things we see there were there prior to the accident, on the north side?

A. I would say the tracks weren't there prior to the accident.

Q. I am referring not only to—well, now, do I understand, Mr. Flake, it is your statement that all of the vehicular tracks which appear on the north side of the pavement were there, not there prior

(Testimony of Glenn Flake.)

to the accident, did not occur between the time of the accident and the time the picture was taken and, therefore, were in some fashion related to the accident?      A. Well, I will say——

Q. No; I am asking you. You are telling me now all the tracks on the north side of the pavement——

Mr. Palmquist: Could we ask what picture you have there?

Mr. Wilmer: Yes, surely. I am referring to 25, I believe I stated.

Mr. Palmquist: Plaintiff's 25?

Mr. Wilmer: Yes. [149]

Q. (By Mr. Wilmer): Now, do I understand everything that is on the north half of the pavement was there, that it was not there prior to the accident and did not occur between the time of the accident and the time of the taking of the picture?

Mr. Scoville: He hasn't said that as yet.

Mr. Wilmer: I am asking him, Mr. Scoville. Do I understand that as your statement?

A. No. I will say there were tracks made after the accident.

Q. And before the picture was taken?

A. Before the picture was taken, particularly tracks back here like this, that was made by my car coming in.

Q. These tracks through there, you don't know whether they were there before the accident or not; I am referring now to the north half of the pavement to the east of the oil repair, you don't know whether those were there before?

(Testimony of Glenn Flake.)

A. No, I don't know whether those were there before or not.

The Court: At this time, Gentlemen, we will take a recess for about five minutes. During the recess please bear in mind the admonition given you.

(Recess.)

Q. (By Mr. Wilmer): When you arrived at the scene of the accident, do you recall where the two-wheel trailer was?

A. It was off to the north side of the highway, off the [150] road.

Q. How far off?

A. I would say twenty feet.

Q. Did you make any examination of it?

A. Nothing for a report. I just looked at it. I think it was upside down, if I recall.

Q. Do you recall whether or not the tongue, I am referring to now the portion of the trailer that leads out from the trailer and attaches to the car, was bent?

A. I don't recall on that.

Q. You don't recall?

A. No.

Mr. Wilmer: I think I have no further questions.

### Redirect Examination

By Mr. Scoville:

Q. Do you know of any close-up pictures being taken of the trailer, the luggage trailer?

A. No, I don't remember any.

Mr. Scoville: That is all.

Mr. Wilmer: No further questions.

(Witness excused.)

## PHILLIP R. COOK

called as a witness herein, having been first duly sworn, testified as follows: [151]

## Direct Examination

By Mr. Palmquist:

Q. Mr. Cook, your full name is?

A. Phillip R. Cook.

Q. How old are you, Mr. Cook?

A. Twenty-two, sir.

Q. Where do you reside?

A. Flagstaff and the fire hall just temporarily right now.

Q. How long have you lived in Flagstaff?

A. Since 1946.

Q. I call your attention to July 10th of 1954; were you in Flagstaff at that time?

A. Yes, I was.

Q. What was your occupation?

A. Fire department, engineer.

Q. And did you receive a call which took you to a spot some seven and a half miles west of Flagstaff?

A. Yes, sir.

Q. And do you know how you received that call?

A. Yes, sir, I do.

Q. And how did you receive that call?

A. By one of the city policemen came up in the dorm and woke the driver and myself up; and immediately we called the Chief, got an okay to take the truck out of town. So we responded in about two minutes' time.

(Testimony of Phillip R. Cook.)

Q. What was the name of your city police officer that came [152] to you?

A. Cecil Wedgeworth.

Q. Cecil Wedgeworth? A. That is right.

Q. Could you describe the equipment that you took?

A. One 1954 three-quarter ton G.M.C., equipped with a centrifugal type pump powered by power take-off which would, I guess, pump about two hundred pounds with the engine revved close to one thousand r.p.m.'s or better. That is about the size of the truck.

Q. Now, when you drove out there, did you go alone or did the police officer ride with you?

A. Officer Wedgeworth responded with me with a resuscitator.

Q. Can you tell us on your way out there do you remember passing any other vehicles or that passed you?

A. Yes, I passed quite a few vehicles. But there was one patrol car passed me about a half mile before I reached the scene.

Q. Did you see that patrol car at the scene when you arrived there? A. Yes, sir.

Q. Do you know which patrol officer that was?

A. That was Mr. Flake.

Q. When you arrived there, did you see a Mr. Harris, an Army man from the Ordnance Depot at the scene? [153] A. I recall I did, yes.

Q. He was there. Do you remember his wife was there? A. I remember his wife quite well.



(Testimony of Phillip R. Cook.)

Q. I am trying to establish about what time you got there. When you got there were the people that had been in the Hudson still in the Hudson?

A. Yes, sir.

Q. And how many people were there?

A. In the car you mean, sir?

Q. Yes. A. Two.

Q. A man and a woman? A. That is right.

Q. Did you see any other persons that had been occupants of that car? A. No, sir.

Q. If there had been they had been taken away when you got there? A. Yes, sir.

Q. When you got there, did you see some situation that called for your services?

A. Yes, sir; very definitely.

Q. What was that situation?

A. Well, there was a typical fire hazard with all the gasoline over the road and people coming up with cigarettes [154] which definitely created a bad fire hazard.

Q. Now, I will show you Plaintiff's Exhibits Numbers 15 and 16. Do you recognize those pictures? A. Yes, sir.

Q. Was that the position of that Hudson car when you arrived there? A. Yes, sir; it was.

Q. Can you tell me, were you there when that picture was taken? A. Yes, sir.

Q. Was that picture taken before you washed it down or after you washed it down?

A. Actually I washed down about three different

(Testimony of Phillip R. Cook.)

times really. The first time was to wet it down, to knock down the hazard.

Q. We are interested in knowing the pressure that was exerted by the fluid that you used, also the fluid you used. Let's start with the fluid. What type of fluid did you use when you washed it down?

A. Regular water with an additive, wet water it is called. It is used for forest fires. It is a highly concentrated salt.

Q. It is a concentrated salt mixed with water and called wet water?           A. That is right.

Q. Gives water a penetrating—— [155]

A. Action, that is all.

Q. What pressure was exerted by this stream of wet water as it washed on the highway, do you know the pounds?

A. I would say the way the truck was equipped then it had no throttle on it so the engine had to idle; like I was saying the top pressure would be about two hundred pounds at certain r.p.m., but at idling r.p.m. it couldn't develop over, I would say, between sixty and seventy pounds and that is not nozzle pressure, that is just gage pressure. Of course you have friction loss in your hose when you have so many feet out.

Q. Do you know what the pressure is on the ordinary garden hose?

A. I would say around, depend on the town, but I would say around forty-five or fifty pounds.

Q. Could we compare the pressure you used——

Mr. Wilmer: Just a moment. It is a matter of

(Testimony of Phillip R. Cook.)

common knowledge that the pressure in water systems varies from six pounds to a hundred. Comparing this to a garden hose is a matter outside the experience of this witness unless he compares it to a particular water system.

Mr. Palmquist: I guess counsel is right. I was thinking about my garden hose.

Q. At least the garden hose you were thinking of was about forty-five pounds. Can you tell us what you think the pressure was as you used it that night? [156]

A. Between forty and fifty pounds.

Q. Before you did this washing, did you observe certain marks and things, debris out there on that highway?

A. There was a certain amount of debris, yes.

Q. Did you observe where those marks and debris were in relation to the center white line of the highway?

Mr. Wilmer: Just a moment. If it please the Court, we have no objection to him testifying what debris was there but we do object to him testifying as to marks unless they are identified and described and related to the accident.

The Court: I think the objection is good. He should describe the marks.

Q. (By Mr. Palmquist): All right. Did you see certain marks out there at the scene of this accident?

A. There was just one large mark that was actually noticeable to me.

(Testimony of Phillip R. Cook.)

Q. I show you Plaintiff's Exhibit 19-A and ask you to look at that. Does that picture look familiar?

A. Yes.

Q. What do you see in that picture?

A. This is the one mark I was thinking of right here, and that here was where the car was sitting after the accident.

Mr. Wilmer: For the purpose of the record, it is very unintelligible and for our purposes also to be unable to see what he is pointing to or [157] describing.

Mr. Palmquist: I will hold it up.

The Witness: This is the line I was referring to here. And here is where the car came to rest in a downhill position.

Q. On the black top, was it?

A. On the black top.

Q. You were pointing to the east edge of that black top, is that where it was?

A. Of the picture.

Q. Do you see the rear end of the trailer down there?           A. Yes, sir.

Q. Do you recognize whose patrol car that was in there?

A. That one right there, no, sir, I couldn't tell you. I wasn't there when the picture was taken.

Q. Yes, but do you see some marks on the highway there that were there the night of the accident?

A. Yes, sir.

Q. Were those marks that were shown by this picture there before you did your washing?

(Testimony of Phillip R. Cook.)

Mr. Wilmer: Just a moment, if it please the Court, counsel is not referring to any specific marks. I have no way of knowing and I think the witness has no way of knowing what he is talking about.

Mr. Palmquist: There is a picture of the marks.

The Court: Let him point out the marks he is talking about. Refer to it by number, 19-A, for the record. [158]

Q. (By Mr. Palmquist): Will you take this pen and put some X's on the marks? When you said "marks," point out the various marks.

A. All right. The marks there, actually they are staggered here but those are the marks I remember.

Q. You put X's on them?

A. That is right.

Q. Now, were those marks there before you did your washing?

A. Yes, sir. I was nowhere close to that actually except on the black spot. That was the only place I washed down.

Q. Besides these marks did you see certain debris out there, glass, parts of door handles?

A. Where on the picture?

Q. Any place at the scene of the accident.

A. Around the car, yes.

Q. Around the car. Now, my question is in relationship to the white line, where did you see these marks and this debris?

A. On the north side, sir.

Q. Did you see any marks or debris south of the white line? A. Very little, sir.



(Testimony of Phillip R. Cook.)

Q. Now, when you washed, did those marks that you have marked on there disappear?

A. No, sir; that wasn't where I was washing.

Q. Did any marks disappear as a result of your washing process? [159]

A. I don't believe they could have.

Q. Did you use a broom and do any scrubbing as has been suggested?

A. I used an ordinary house broom to brush a few larger pieces up in two separate piles, one on each side of the car; outside of that that was it.

Q. What were those pieces?

A. Mostly glass, sir.

Q. Was that brushing done on the north side of the highway? A. Yes, sir.

Q. And did you use that broom to scrub away any black marks or gouges on the pavement?

A. No, sir; very definitely I used a broom as little as I had to.

Q. When you arrived out there you say the people were still in the car, is that correct?

A. Yes, sir.

Q. Now, did you help remove them?

A. The lady, sir.

Q. Was the man still in the car?

A. Yes, sir; he was the last one to be taken out.

Q. Was there some difficulty in removing him from the car? A. Yes, there was.

Q. Now, there has been offered in evidence this morning under the defense a picture, Defendant.

(Testimony of Phillip R. Cook.)

Exhibit A. It is [160] rather small. Can you see this all right?      A. Yes, sir.

Q. In order to get the driver of that Hudson out, can you answer this yes or no—was any contour of the wreckage changed in order to get him out?

A. Yes, sir, there was.

Q. Would you explain that to us?

A. As I remember the cable there, the tow truck was out there later and the cowl was pulled ahead in order to get the body loose from the dash and also remove him low enough so they could get the door post out of his head.

Q. To get the door post?

A. Actually it is a part of the top off the door.

Q. By the way, do you remember whether or not the driver of that Hudson, when you got there, still had ahold of the steering wheel?

A. I remember that very clearly. He did.

Q. He still had ahold of it?      A. He did.

Q. Did you notice whether or not there were a pair of glasses that he apparently had been wearing?

A. They were laying in the seat.

Q. They were laying in the seat?

A. Yes, sir, beside him.

Q. Were they broken or not? [161]

A. I can't remember, sir.

Q. In order then to get him out, the tow truck used a cable of some kind?

A. I remember it being pulled ahead so many inches and the strain was taken off of him.

(Testimony of Phillip R. Cook.)

Q. The top of that car as shown by that picture has been changed in that process?

A. Very little, but, as I say, a matter of inches.

Q. I show you a picture, in fact two pictures now. May I have these marked for identification?

(Plaintiff's Exhibits 35 and 36 marked for identification.)

Q. (By Mr. Palmquist): Were you present when these two pictures were taken? A. Yes.

Q. Do you remember who took those pictures?

A. I don't remember whether it was Bryfogle or Paxton.

Q. Paxton, you say? A. Yes.

Q. Did Paxton take some pictures?

A. I thought he did.

Q. Can you tell me regardless of who took those pictures, are those a fair and true, correct representation of the actual damage that existed to the top of that car and the windshield post and the door post as was shown here in Defendants' A, except for the differences? [162]

A. Yes, sir.

Q. That was before the tow truck had pulled the contour of that wreckage apart, is that right?

A. Yes, sir. Right in here, it was pulled in here and eased the strain in here (indicating).

Q. Does that show also the impalement of the victim? A. Yes, sir.

Q. Does that also show the victim still holding onto the steering wheel?

(Testimony of Phillip R. Cook.)

Mr. Wilmer: Just a moment. That has not been offered in evidence.

The Court: Objection sustained.

Mr. Palmquist: We offer it in evidence at this time.

Mr. Wilmer: We object for the reason previously stated. Your Honor has seen the pictures, they serve no useful purpose. The only effect is to improperly inject the issue of sympathy in the case.

Mr. Palmquist: It is no issue of sympathy. A man asleep would not be holding the steering wheel, your Honor.

The Court: The objection will be sustained.

Mr. Palmquist: We also offered them, if your Honor please, to show the true contour of the shape——

The Court: I sustained the objection for all of the purposes.

Q. (By Mr. Palmquist): Very well. Now, there definitely [163] was damage to the front end of the truck, was there, as shown by Defendants' Exhibit B?

A. There was considerable damage there.

Mr. Palmquist: I understand, counsel, you don't represent this picture as being taken at the scene?

Mr. Wilmer: I don't know what picture you are talking about.

Mr. Palmquist: Defendants' Exhibit B.

Mr. Wilmer: We stated that was not taken at the scene of the accident.

Mr. Palmquist: Can I ask when this was taken?

(Testimony of Phillip R. Cook.)

Mr. Wilmer: I believe it was July 12th, if not that, July 17th.

Mr. Palmquist: It was taken after it had been towed in?

Mr. Wilmer: Behind the—that garage in Flagstaff.

The Witness: Hutchison Motors.

Mr. Wilmer: Yes, Hutchison Motors.

Q. (By Mr. Palmquist): Here is a picture I would like to call your attention to, Plaintiff's Exhibit 30. That was taken at the scene of this accident, was it not? A. It was.

Q. As shown by Defendants' Exhibit B, the left front of that bumper has been pushed right back with considerable force, was it not?

A. Yes. [164]

Mr. Wilmer: If it please the Court, counsel is asking the witness to interpret the picture for the jury. It is up to them to look at the picture and reach whatever conclusion they desire.

The Court: The objection is sustained.

Q. (By Mr. Palmquist): Is this picture here—and I call your attention particularly to the left running board and battery—a correct representation of that truck as it sat out there that night?

A. Yes.

Q. I will ask you the same question—I would like to have the gentlemen of the jury compare these, follow up with these pictures—I will ask you if that is also— A. The same time.

Q. —the same time, at the scene of the acci-



(Testimony of Phillip R. Cook.)

dent, is that correct?           A. That is right.

Q. You can recall also, can you, Plaintiff's Exhibit 32 shows the left side of that trailer as it sat on the north side of the highway there that night?

A. That is right.

Q. That is a correct representation?

A. Yes.

Q. If we were looking for damage on the left side of the trailer, if it existed, we might find it on Plaintiff's [165] Exhibit 29, that is a correct representation?           A. Yes, it is.

Q. And do you recall what Plaintiff's Exhibit—wait a minute, I thought this one was in evidence—it is Plaintiff's Exhibit 34. Do you remember the left front fender of the Hudson under the spare tires there?

A. I don't remember if it was the fender off the Hudson or not; I do remember the debris under the wheels.

Q. Did you examine the front of the truck, Mr. Ripka's truck out there or that tractor as to any markings, bolts that may have caused certain markings on the Hudson?

Mr. Wilmer: Your Honor, may I have that question, please?

(The last question was read.)

Mr. Wilmer: If it please the Court, we have no objection to him testifying what he saw; we do object to him drawing conclusions.

The Court: Objection sustained.

(Testimony of Phillip R. Cook.)

Q. (By Mr. Palmquist): The question, Mr. Witness, is did you make such an examination, yes or no?

A. I just looked at the truck; I didn't make any examination.

Mr. Wilmer: I am sorry, I can't hear the witness.

The Court: Keep your voice up, please, and talk so the furthest juror can hear you. [166]

The Witness: I looked at the truck that night but I didn't make any inspection.

Mr. Wilmer: Thank you.

Q. (By Mr. Palmquist): I call your attention to Plaintiff's Exhibit 7, which shows the left rear side of the Hudson. Do you see a board impaled into that as shown in that photograph?

A. I see a board in the door, yes.

Q. Is that—did you see that there the night of this accident? A. No, I didn't.

Q. Do you remember a tarpaulin?

A. There was a tarp on this side of the car along with the box of the trailer, setting on this side of the car. The trailer was setting over here, like the car was here, just the box of the trailer. The frame of the trailer was down in the ditch.

Q. You distinguish between the box and the frame, correct? A. That is right.

Q. Would you step down here to Plaintiff's Exhibit 3 and draw in for us, if you will, where the box to that trailer was in relation to the car?

A. This is our truck here.

(Testimony of Phillip R. Cook.)

Q. This is the culvert. This has been drawn in to represent the black patch across the culvert.

A. The car is sitting here and the box still on the highway [167] was sitting approximately in here. There were several large pieces and the contents were all around in here. As I remember, the frame of the trailer was down over here.

Q. I am sure you don't understand. North is to the top, this would be the westbound lane, this would be the eastbound lane.

A. East.

Q. This is the oil surface. This is the edge of the highway out here, guideposts and culvert, and someone has drawn this as having represented the car and this representing the trailer.

A. I see.

Q. You can ignore all markings and put in your own markings. First of all, you draw in with blue where you think you remember the car and its position.

A. I would say the car—this is the culvert then?

Q. Yes, that is a culvert.

A. I would say the car would be right in here.

Q. Just draw it in.

A. I would say this is the car here (indicating).

Q. All right, we will call that "C-1." Now, put in a square to show the box of the trailer.

That would be "C-2." Now, by that, you mean just the wooden part, right?

A. The wooden part and its contents. [168]

Q. All right. Take and draw a line where you saw this tarpaulin or canvas you mentioned.

(Testimony of Phillip R. Cook.)

A. It was lying right in here on the back part of the car.

Q. Up on the car? A. Yes, sir.

Q. One of these pictures I believe shows that. I am referring to Plaintiff's Exhibit 15. Does that show the canvas or tarpaulin you are talking about?

A. That is right. It has been pulled down but it was over the back part of the car.

Q. Will you take and make in ink "X" on that tarp or canvas you are talking about?

A. I can't mark very well.

Q. Maybe a lead pencil will do it. Try this lead pencil.

(Witness indicates on diagram.)

Q. So the "X" is on the tarp of Plaintiff's Exhibit 15. Now, draw in for us, if you will, the frame of the trailer.

A. As I remember it, it was situated over in the ditch about in here. That is down off the shoulder down toward the borrow ditch.

Q. We will call that "C-3."

Now, you may be seated. This thing you have been calling the box "C-2," was that made of wood?

A. Yes, sir.

Q. And do you remember what the color of that wood was? [169]

A. Green, if I remember right.

Q. Green. Do you see this splintered board that appears at the left of this car, Plaintiff's Exhibit 7?

A. I see it.

(Testimony of Phillip R. Cook.)

Q. Would that be about the size of the slats that were in that box you have drawn up there, "C-2"?

A. I couldn't say for sure. I believe they were a little larger.

Q. Here is Plaintiff's 24, over the bank, do you see something there that——

A. Part of the debris from the trailer.

Q. Part of the debris from the trailer?

A. That is right.

Q. Can you make a "X" or arrow pointing to that for us?

(Witness indicates.)

Q. So the "X" you have drawn on Plaintiff's 24, was that the frame or the box?

A. I couldn't say.

Q. But it was part of the debris?

A. It was part of the debris.

Q. Mr. Cook, here is a picture, Plaintiff's Exhibit 10 for identification, it was taken of the Hudson in the garage and it shows the right side of the Hudson. But I want to call your attention particularly to the right headlight. Can you tell me whether or not that would correctly represent to you [170] the right side of that Hudson as it was after that accident?

A. I wouldn't say. I was too busy trying to get the woman out to actually look at the car on this side, because I knew it wasn't hurt very bad.

Q. Can you recall whether or not the right headlight wasn't even broken?



(Testimony of Phillip R. Cook.)

A. I wouldn't say.

Q. Well, would you look at this one which is Plaintiff's 9 for identification, where you can see the left side of the damage in which it does show the right headlight?

A. It apparently is there.

Q. Does that refresh your memory?

Mr. Wilmer: Is that in evidence?

Mr. Palmquist: No, these are not in evidence.

Mr. Wilmer: Now, if it please the Court, counsel is tendering exhibits that are not in evidence, asking him to testify to their contents and refresh his recollection.

Mr. Palmquist: I am asking him to refresh his recollection so he could testify to the truth and accuracy of these.

The Court: If you are going to test his memory you should first be satisfied that he needs it.

Q. (By Mr. Palmquist): Could you help me with these pictures? Whether or not this Plaintiff's 9 would be a true and correct representation of that Hudson? [171]

A. As close as I can remember.

Mr. Palmquist: We will offer that picture in evidence at this time.

Mr. Wilmer: We don't believe there is any foundation laid, your Honor, but I don't believe it is worth quibbling over. This picture does not conform to the others that are in evidence.

The Court: You are not objecting to 9, is that right?

(Testimony of Phillip R. Cook.)

Mr. Wilmer: Maybe I had better look at it. Might I look at a couple of the other pictures? We have no objection to either of them.

Mr. Palmquist: We offer both in evidence, 9 and 10.

The Court: They may be admitted.

(Plaintiff's Exhibits 9 and 10 marked in evidence.)

Q. (By Mr. Palmquist): Can you tell me whether or not this—I am pointing to what looks like might be a hose or could be a rope or cable in Plaintiff's Exhibit 15, I was wondering if that is your fire hose, or what that is?

A. I will have to look at it. No, that is a tow cable off the tow truck.

Q. That is a tow cable off the tow truck?

A. Right.

Q. By the way, I notice a man, I can just see a profile here, maybe you know who that man is.

Who is that man? A. This picture? [172]

Q. Yes. A. Mr. Veazey.

Q. And who is Mr. Veazey?

A. He was the man that responded with the wrecker that night.

Q. Can you tell me is the victim still in the car there? A. Yes, he is.

Q. In Plaintiff's 15? A. Yes.

Q. They are getting ready to pull the wreckage apart, is that it?

A. That is right; pull the cowl ahead.

(Testimony of Phillip R. Cook.)

Q. Did you find some personal property of the victim's that was in this Hudson, scattered around there?      A. Yes, sir.

Q. Could you tell us what kind of personal effects you observed that were scattered?

Mr. Wilmer: That is immaterial, if it please the Court. There is no objection to testifying where they were, but I see no point in going back into these same little suggestions that there were children's toys, something like that.

Mr. Palmquist: Counsel reads too much into the importance of this. If your Honor please, this will become important.

Mr. Wilmer: Very well, withdraw my objection on counsel's [173] statement.

Mr. Palmquist: Among other things——

The Court: Counsel has withdrawn the objection. Go ahead.

Q. (By Mr. Palmquist): What kind of personal effects did you observe?

A. Just the average family's goods, household goods.

Q. Did you help pick up some of the things?

A. Some of the stuff that was out and large stuff, had quite a bit of help out there, but there were several of us picked the things up. I can't recall what it was.

Q. Can you recall anything at all you picked up, any one thing?

A. There were some birthday napkins, I distinctly remember that.

(Testimony of Phillip R. Cook.)

Q. Birthday napkins? A. Yes.

Q. Do you know where you found them?

A. They were on the right side of the car and also in the front seat.

Q. Do you remember picking up a camera or seeing a camera picked up?

A. Yes; Officer Wedgeworth found a camera.

Q. Do you know where that was found?

A. No; I couldn't tell you. [174]

Q. All right. Do you know in relationship to the center line where was this property found, these various effects?

A. On the north side.

Q. All on the north side of the center line; that would be the westbound lane then?

A. That is right.

Q. Then in relationship to this ditch or off the highway where the trailer went, off on the north side and off of the highway, was any of it found over there out where the frame of the trailer went?

A. Miscellaneous small articles were scattered around in back of the car, yes.

Q. Then I am particularly interested in as to west of that point, going westerly or where the car was stopped where you washed the gas from under the car, did you find any of these things scattered westerly of there and also out in the ditch?

A. There were a few small articles, what they were I don't know. There wasn't very much because I pulled the fire truck on west of the wreckage.

Q. All right. You may cross-examine.

(Testimony of Phillip R. Cook.)

Mr. Wilmer: It will take a little more than fifteen minutes, if your Honor please.

The Court: We will recess until 1:30. Please be back promptly. Bear in mind the admonition given you heretofore. [175]

(Whereupon, a recess was taken at 11:45 a.m. until 1:30 o'clock p.m.)

### Cross-Examination

By Mr. Wilmer:

Q. Mr. Cook, how long after you arrived at the scene of the accident did you start wetting down the area where the gasoline was?

A. Almost immediately, sir.

Q. How long did you continue that?

A. I would say about five minutes.

Q. Do you think it might be as much as ten minutes? A. No, sir.

Q. You stated you used water under a pressure of forty to fifty pounds? A. Correct.

Q. It would not be as much as seventy-five pounds? A. No, sir, it wouldn't.

Q. Now, how large an area of the pavement, Mr. Cook—and I am referring now from east to west——

A. East to west.

Q. ——how much of an area of the pavement did you cover with the so-called wet water solution?

A. Including the car I would say about five feet on the east side.

Q. Not as much as thirty feet? [176]



(Testimony of Phillip R. Cook.)

A. Across, yes.

Q. I am speaking of east and west.

A. Not east and west, no, sir.

Q. How far from the car to the east would you say there was scattered along the highway articles of personal property? A. To the east?

Q. Yes. A. I don't know offhand.

Q. How wide was the highway there?

A. I don't know, sir.

Q. Well, would the area the size of the width indicated on the exhibit there of, I believe it is twenty-two feet pavement and eight-foot shoulder on each side, seem about right to you?

A. Yes, sir.

Q. After you finish wetting down the area there on the road which you say you did wet down, what did you do then?

A. I think the next thing was the ambulance arrived and we started to get the woman out of the car.

Q. And when that was completed, what did you do?

A. I think we picked up a bunch of the scattered articles and put them behind the car out of the way.

Q. You had started, with the others who had come to the scene of the accident and had gathered from the highway and along the highway articles from the automobile? [177]

A. And the trailer, yes.

Q. There were quite a number of people there at the time helping you?

(Testimony of Phillip R. Cook.)

A. That is true, yes.

Q. How long did that take?

A. I couldn't say.

Q. It was done promptly, I presume?

A. That is right.

Q. When you arrived there it was about 3:10, was it?

A. I imagine it was. I don't remember just what time the alarm came in.

Q. It was dark at that time?            A. True.

Q. Did you leave before it got light?

A. Yes, sir, I did.

Q. So all the time you were there it was dark?

A. That is right.

Q. Did you see any skid marks at any time while you were there?

A. Behind the automobile on the north lane.

Q. You saw skid marks?

A. Yes, sir; to the east.

Q. Did you say anything then to Roy Bryfogle, the patrolman?            A. I can't say I did. [178]

Q. Did you make a remark to him you could not see any skid marks there?

A. I can't recall, sir.

Q. You do not recall. I believe you also took a broom and swept some debris and other matter off of the pavement, did you not?

A. That is right, sir.

Q. When did you do that, do you remember?

A. That followed after I believe we got the lady

(Testimony of Phillip R. Cook.)

out of the car. It was done all the time we were picking the stuff up.

Q. It is your statement definitely at this time you saw skid marks there, is that correct?

A. Yes, sir.

Mr. Wilmer: Would you mark that, please?

(Defendants' Exhibit C marked for identification.)

Q. (By Mr. Wilmer): Mr. Cook, I hand you what has been marked Defendants' Exhibit C for identification and ask you to examine this and tell me whether or not your signature appears on each page, and also if your signature appears twice at the bottom of the second page and if each of those is your signature? A. Yes, sir, they are.

Q. Mr. Cook, on the side on the margin I notice on page 1 there has been a correction made with some initials opposite it? [179] A. Yes.

Q. Are those your initials?

A. Yes, sir, they are.

Q. Referring to page 2, I note there have been two corrections made with initials appearing opposite those corrections. Are those your initials?

A. Yes, sir, they are.

Q. I presume, Mr. Cook, that because you made these corrections you read the instrument before you signed it? A. I didn't write it, sir.

Q. You read it?

A. I didn't read it after it was written, no, sir.

Q. Why did you make the corrections?

(Testimony of Phillip R. Cook.)

A. I didn't make the corrections, sir.

Q. Why are your initials at the side of the corrections? A. I was asked to place them there.

Q. You signed below a certification you had read it?

A. I guess so. He said to sign it so I did.

Mr. Palmquist: May I see it, counsel? Can I ask counsel who took this statement?

Mr. Wilmer: I don't believe it is a matter of consequence, your Honor. The statement is signed by the witness on each page and the certification signed at the end that he had read it and signed it.

Mr. Palmquist: He said he didn't read it, your Honor. [180]

Mr. Wilmer: It becomes a matter then of the jury determining the weight and credibility to be attached to it.

The Court: May I see it? I think the witness should be allowed to read it.

Mr. Wilmer: I have no objection to him reading it.

The Court: It may be admitted. The witness may read it if he desires.

Mr. Wilmer: I propose to read it to the jury, your Honor, then I will give it back to the witness for examination, if that is satisfactory.

(Defendants' Exhibit C marked in evidence.)

Mr. Wilmer: It is headed: "Flagstaff, Arizona, July 26, 1954. Statement of Phillip Cook. I am Phillip Cook, I am twenty-one years of age, my

(Testimony of Phillip R. Cook.)

address is Box 330, Flagstaff, Arizona. I am married and have two children. I have lived in Flagstaff the past eight years and this is my home. My parents live in Claremore, Oklahoma. On July 10, 1954, at about 3:10 a.m. I was called to the scene of an accident about seven or eight miles west of Flagstaff, Arizona, on U. S. Highway 66. I was not more than about five minutes going out to the scene. A City Police Officer," the word "Ray" has been crossed through and there are initials on the side. "P.R.C." That was the correction I referred to in the first statement. That is crossed out and changed to "Mr. Wedgeworth was in the fire truck with me. A couple of patrol cars were there [181] when I got there, and the injured children had already been moved. Within a few minutes after I got there, I started washing the pavement with water from the first truck which has 'wet water' added. The 'wet water' helps to penetrate. I was using about seventy-five pounds pressure on the hose and water I put on the road. The gasoline was all over the road and running across the road toward the south side of the road. It was coming out of the Hudson, which was on the north edge of the pavement, about half on the pavement and half off the pavement." There again a correction with initials on the side. "I washed the road about ten minutes and covered about thirty-five or forty feet area across the road in front of the Hudson. Then I helped clean off the highway, and swept the highway, cleaned off the glass, broken metal," correction with initials at the



(Testimony of Phillip R. Cook)

side of it. "Household goods, etc. I was there when the dead people were moved. The traffic was just using one lane of the highway, which was the south lane, or eastbound lane of the highway. The chassis of the luggage trailer was on the north side of the highway, I would guess about fifteen to twenty feet off the pavement. I was out there at the scene of the accident about two hours or more. I have been a wrecker driver for several years, and I have been to the scene of many accidents. I could not see any skid marks at all. I commented to Roy Bryfogle that there were no marks, and he said, 'I can't [182] see any.' That was while it was still dark, and I left the scene before it got good daylight. I guess I got to town about 5:00 a.m. The portion of the highway which I washed was an oiled patch on the highway, where the accident took place. I had a lot of help in cleaning off the road. Doug Paxton, Shelby McCauley, and a lot of other people were helping. When the ambulance parked to pick up the dead driver and his wife, it parked on the north lane of the highway in the westbound lane of traffic. All the time I was there the traffic was using the eastbound, or south, lane of the highway. I used both the water and a broom to clean the highway. Phillip R. Cook.

"I have read my above statements of three pages, each page of which I have signed, it is a true statement." Signed: "Phillip R. Cook."

We have no further questions.

Mr. Palmquist: I have no questions.

The Court: That is all; you may step down. May this witness be excused?

Mr. Wilmer: Yes, your Honor.

(Witness excused.)

CECIL LEWIS WEDGEWORTH

called as a witness herein, having been first duly sworn, testified as follows: [183]

Direct Examination

By Mr. Palmquist:

Q. Would you state your full name?

A. Cecil Lewis Wedgeworth.

Q. What is your age, please?

A. Twenty-eight.

Q. Where do you reside?

A. Flagstaff, Arizona.

Q. How long have you resided there?

A. A little over two years.

Q. And are you a married man?

A. Yes.

Q. With a family? A. Yes.

Q. What is your occupation?

A. I am a policeman.

Q. How long have you been a policeman?

A. Be five years next month.

Q. And what department are you associated with?

A. I am with the Flagstaff Police Department.

Q. Were you in that position on July 10, 1948—  
I mean 1954, I beg your pardon? A. Yes.

Q. The day of the accident between the refriger-

(Testimony of Cecil Lewis Wedgeworth.)

ator truck and a Hudson, seven and a half miles west of Flagstaff, do you recall that? [184]

A. Yes.

Q. Did you go to the scene of that accident?

A. Yes.

Q. When did you first learn of that accident?

A. I don't recall the exact time.

Q. How did you learn of it?

A. The accident was reported to the police department by a tourist traveling through.

Q. Was it as a result of that report that you went out there? A. Yes, sir.

Q. Do you remember what the report was?

A. Yes, the report stated——

Mr. Wilmer: If it please the Court, it is immaterial what someone told him at the police department. We have no question but what he went out there in response to a report. That is all that is material.

The Court: The fact of the report is all that is material.

Q. (By Mr. Palmquist): How did you go to the scene of the accident?

A. In the emergency fire truck.

Q. Were you with Phil Cook? A. Yes.

Q. Who drove out there? [185]

A. Phil Cook drove the truck.

Q. On the way out do you remember a patrol car passing you? A. Yes.

Q. What kind of a car?

(Testimony of Cecil Lewis Wedgeworth.)

A. It was a Ford highway patrol car. I don't remember the year.

Q. When you arrived at the scene of the accident was there a patrol officer there? A. Yes.

Q. And how many officers?

A. There were two patrol officers there when I arrived.

Q. And who were they?

A. Roy Bryfogle and Glenn Flake.

Q. What did you do when you arrived out there?

A. I assisted the driver of the fire truck to get his rig started. There was a lot of gasoline on the pavement. Also I assisted in removing the bodies from the wreckage.

Q. Did you see some marks on the highway?

A. Yes.

Q. As a police officer have you had occasion to investigate accidents? A. Yes.

Q. Have you had some training in that regard?

A. Yes.

Q. Have you had experience in that [186] regard? A. Yes.

Q. And do you know what is meant by the point of impact? A. Yes, I do.

Q. Have you had some training regarding the establishing of the point of impact? A. Yes.

Q. Would you indicate what kind of evidence you looked for to establish the point of impact?

A. The violent skid marks and breakage of glass, dirt that comes out from under the fenders

(Testimony of Cecil Lewis Wedgeworth.)

of cars and little debris that falls off at the point of impact.

Q. Are gouge marks in pavement a significant factor?

Mr. Wilmer: If it please the Court, this is getting outside the realm of this lawsuit and speaking generally of investigation of lawsuits, which is immaterial, or the investigation of accidents, which is immaterial. It may be significant in one case and completely insignificant in another.

The Court: I will let him answer this question.

Q. (By Mr. Palmquist): Would you answer the question?

A. Yes; I think gouge marks could be definite——

Q. Did you find or see any physical evidence out there where this accident took place which would establish a point of impact?

Mr. Wilmer: We object to that, if it please the Court, [187] on the ground that we have no objection to him testifying what he saw there——

Mr. Palmquist: He can answer yes or no.

Mr. Wilmer: Just a moment. No, if it please the Court.

The Court: The witness should be permitted to describe what he saw out there.

Q. (By Mr. Palmquist): Would you tell the Court and jury what you saw when you arrived out there, when you arrived at the scene of the accident?

A. When I arrived at the scene of the accident the Hudson car was in the westbound traffic lane



(Testimony of Cecil Lewis Wedgeworth.)

somewhat of an angle headed to the southwest. I don't know how far it was from the center line, I didn't make any measurements. There was quite a bit of debris around the car, both sides of it. And I noted there was a truck in the ditch somewhat to the east of the car.

Q. About how far to the east of the car?

A. I would imagine a couple of hundred feet.

Q. About two hundred feet?

A. I didn't measure it.

Q. And did you estimate as you looked at the Hudson whether or not any of the rear end of that car was off the paved portion of the highway?

A. I think the whole rear end was on the pavement. [188]

Q. Now, we have some pictures here in evidence. With relation to a black patch on the highway, did you determine where the Hudson was in relation to that patch?

A. The Hudson was partially on the black patch of pavement and part of it off.

Q. And how much of it was on the black patch?

A. Just the front end of the car.

Q. Just the front end. And where was the rear end of it?

A. The rear end of the car would be back on the lighter colored pavement and further toward the shoulder on the north.

Q. There is a white center line down that pavement, is that correct?      A. Yes.

(Testimony of Cecil Lewis Wedgeworth.)

Q. In relationship to that center line, where did you find this debris that you have spoken about?

A. The debris was plastered on the left side of the vehicle, also scattered up and down the north side of the road.

Q. What kind of debris, when you say debris, what kind of debris did you find plastered, as you put it, on the left side of the vehicle?

A. A portion of a load they had in a two-wheel trailer, the tarp it was covered with and papers and the wrappings and such, the packages in the load had been wrapped with.

Q. And did you find any portion of the trailer near that car? [189]

A. It seems part of the box of the trailer was in the debris that was stacked against the car.

Q. And did you find what became of the trailer proper or the frame of the trailer?

A. The chassis of the trailer was up in the borrow ditch on the north side of the road, on the west side of where the car came to rest.

Q. Now, did you find any marks such as have been indicated here in Plaintiff's Exhibit 19-A?

A. I didn't look for marks. There were skid marks. It wasn't my job to look for them; however, there were a good number of skid marks around there.

Q. Can you tell us on which side of the center line those skid marks were?

Mr. Wilmer: We object to that. No foundation, if it please the Court.

(Testimony of Cecil Lewis Wedgeworth.)

Mr. Palmquist: I will withdraw that question.

Q. (By Mr. Palmquist): Did you see any debris or marks of any kind south of the center line in the eastbound lane? A. No.

Q. Did you see any marks or debris in the westbound lane, which is north of the center line?

A. Yes, I did.

Q. Did you see those things before the washing process began? A. Yes. [190]

Q. Did any of those marks where the washing process took place disappear?

Mr. Wilmer: Just a moment. If it please the Court, we object to that as being no foundation laid. The witness has not testified he examined the pavement. He said he didn't examine it for marks. Now counsel is asking him if any marks disappeared or didn't disappear in the course of the washing.

Mr. Palmquist: He said he saw marks.

The Court: I will let him answer.

Q. (By Mr. Palmquist): You may answer.

A. I don't think any of the marks that I saw disappeared.

Q. Can you help us with what force that stream of water, wet water, I understand it is called, struck the pavement?

A. About the same as an ordinary garden hose.

Mr. Wilmer: I move to strike that as being not responsive, if it please the Court.

The Court: It may be stricken. The jury will disregard the answer.

(Testimony of Cecil Lewis Wedgeworth.)

Q. (By Mr. Palmquist): Was it forcible or can you tell us in pounds, give us some idea?

A. I don't know what force the pump would put out. The force wasn't very great.

Mr. Wilmer: We object to that, if it please the Court, as his conclusion. He has stated he didn't know what the pump [191] would do and then attempts to testify with what force the water came out.

The Court: It may stand.

Q. (By Mr. Palmquist): How long did you stay out there at the scene of the accident?

A. I stayed until the coroner had arrived, made his investigation and both bodies had been removed.

Q. Was it still dark or had it gotten daylight by the time you left?

A. It was beginning to get light when we left.

Q. Were some photographs taken while you were out there?      A. Yes.

Q. Had traffic started to move past the scene of the accident by the time you left?      A. Yes.

Q. And how was that traffic moving past the scene of the accident, can you tell us?

A. The traffic was directed past the scene of the accident on the eastbound lane south of the accident.

Q. Was any of that traffic allowed north of the white line?      A. I don't recall that it was.

Q. We have some pictures taken the next morning which show both vehicles. I just want to make certain; I call your attention to Plaintiff's Number

(Testimony of Cecil Lewis Wedgeworth.)

31. You see the rear end of the trailer down [192] there?      A. Yes.

Q. Is that the approximate position, if you recall, where the trailer ended?      A. Yes, it is.

Q. Then you see there is a patrol car parked in front of the trailer there?      A. Yes.

Q. That is looking toward Flagstaff. Then you notice on the north side of the highway there is a wreckage of some kind. Can you identify that wreckage?

A. It looks like the Hudson car that was involved in the accident.

Q. Is that the position of that Hudson car when you arrived out there with Bill Cook that night, is that where it was?      A. No, it is not.

Q. If that is the Hudson car it has been moved then, is that correct?      A. Yes.

Mr. Palmquist: You may cross-examine.

#### Cross-Examination

By Mr. Wilmer:

Q. Mr. Wedgeworth, after you arrived there how soon did Mr. Cook start wetting down the pavement?

A. Just as soon as he could get his pump started and hose out. [193]

Q. In other words, he did nothing after he arrived there but start getting his hose out and start wetting down the pavement?

A. As I recall that is correct.



(Testimony of Cecil Lewis Wedgeworth.)

Q. How large an area did he wet down?

A. Just a small area underneath and south of the car where the gasoline ran out.

Q. How small an area would you say?

A. Probably an area about eight feet wide.

Q. Eight feet wide. Now, during that time, Mr. Wedgeworth, what were you doing?

A. I assisted in removing the woman in the back seat of the car. I believed she might still be alive.

Q. Had the ambulance arrived by then?

A. The ambulance arrived then.

Q. It was dark I presume when you got there?

A. Yes, it was.

Q. And continued dark until you left, did it?

A. It was getting light when we left.

Q. You left with Mr. Cook, I presume?

A. Yes.

Q. How long would you say you stayed there?

A. I would say an hour, maybe a little over.

Q. The first thing you said you did was to get the woman out of the car, is that correct? I mean, that was your first [194] activity, let me put it that way?

A. Yes.

Q. Did you start that immediately when you arrived there?

A. The ambulance arrived right behind us. There was a nurse there and as soon as we could get the stretchers out we removed the body.

Q. You promptly proceeded to remove the body and put her in the ambulance?

A. Yes.

Q. And the ambulance left?

A. Yes.

(Testimony of Cecil Lewis Wedgeworth.)

Q. I believe it is your statement you left then as soon as the body was removed, taken away?

A. No, sir.

Q. I thought I understood you to say a minute ago that was the case?

A. I said I left after both bodies had been removed and the coroner was through with his investigation.

Q. How long after the body of the driver was removed did you leave?

A. I don't really know.

Q. Did you participate in any examination made by the Highway Patrol at that time as to what was on the pavement?      A. No.

Q. From the point where the Hudson car was resting how far [195] back to the east would you say there was household goods and similar matters thrown along the pavement?

A. I don't know; I didn't measure it.

Q. I appreciate that, but was it five feet or was it as much as thirty feet?

A. It could have been as much as thirty feet.

Q. Was all of the debris and so on on the pavement cleaned off pretty promptly, the people lend a hand in removing it?

A. No; it wasn't cleaned off immediately.

Q. How soon was it cleared off?

A. I don't know. The debris was still, a good part of it on the highway when I left.

Q. After Mr. Cook and you left it was still on the highway?      A. Some of it was.

Q. How much of it?

(Testimony of Cecil Lewis Wedgeworth.)

A. The items which had no particular value were left there.

Q. Left laying on the highway?

A. On the shoulder.

Q. I am interested in knowing just whether or not before Mr. Cook left there had been completed the matter of removing from the highway the items that had been strewn along the highway, do you remember or do you not remember?

A. A good portion of the items were still there when we left.

Q. I see. Now, Mr. Wedgeworth, did Mr. Cook do anything [196] toward sweeping the debris off the pavement?

A. No.

Q. He did not. That is all.

Mr. Palmquist: May this witness be excused?

Mr. Wilmer: Surely.

(Witness excused.)

Mr. Palmquist: At this time, if your Honor please, we will call the defendant, Gilbert Ripka, as an adverse witness.

### GILBERT RIPKA

called as a witness herein, having been first duly sworn, testified as follows:

### Cross-Examination

By Mr. Palmquist:

Q. Your full name is Gilbert Ripka, is that correct?

A. That is correct.

(Testimony of Gilbert Ripka.)

Q. Mr. Ripka, you have been in Court as all of these witnesses have testified concerning this accident, is that correct? A. Yes, sir.

Q. Mr. Ripka, you were the driver of that refrigerated truck? A. Yes, sir.

Q. That was involved in this accident?

A. Yes, sir. [197]

Q. Do you remember the accident?

A. Yes, sir.

Q. By the way, Mr. Ripka, where do you live?

A. I live in Kewanee, Illinois.

Q. Where did that trip start, this particular trip? A. The beginning of the whole trip?

Q. Yes.

A. It started in, I believe it started at Laurens, Iowa.

Q. You had crossed various state boundaries, had you not? A. Yes.

Q. You had gone from Iowa out to California. is that correct? A. Yes, sir.

Q. What date did that trip start?

A. I don't believe I could answer that without referring to a calendar.

Q. Had you been on the road a month or a week or days? A. About a week and three days.

Q. About ten days?

A. About ten days, yes, sir.

Q. Now, when you got out to the west coast you landed in San Francisco, is that correct?

A. I landed at Alameda.

Q. Alameda? A. Yes, sir. [198]

(Testimony of Gilbert Ripka.)

Q. You unloaded there? A. Yes, sir.

Q. What did you haul to Alameda?

A. Army eggs.

Q. Army eggs. You were working for Wilson Brothers Trucking Company? A. Yes, sir.

Q. Where are they located?

A. Carthage, Missouri.

Q. They have trucks such as this hauling various types of equipment? A. Yes, sir.

Q. When you unloaded at Alameda what did you do?

A. Proceeded to San Jose where I stopped over and called our office.

Q. And you were told to stay at San Jose until they got some instructions? A. Yes, sir.

Q. And you did stay over at San Jose?

A. Yes, sir.

Q. Where did you stay in San Jose?

A. I believe it was the Colonial Motel.

Q. Where did you leave your truck?

A. It was parked on a parking space on the side of the road across from the Colonial Motel. [199]

Q. The first morning you phoned in, and were given some instructions; is that correct?

A. I phoned in, but they had no instructions at that time yet.

Q. When did you finally get some instructions?

A. I got instructions, it was about 2:30 or 3:00 in the afternoon.

Q. That was July 8th?

A. No, sir. July 7th.



(Testimony of Gilbert Ripka.)

Q. July 7th. And those instructions told you to go down to Santa Paula? A. Yes, sir.

Q. When did you get to Santa Paula?

A. I arrived at Santa Paula the morning of the 8th.

Q. That is about a three-hundred-mile trip; is it?

A. Yes, sir.

Q. You had driven all night; had you?

A. No, sir.

Q. How many hours did it take you to drive down there? A. About eight hours.

Q. Did you get to bed about 1:00 or 2:00 o'clock, the morning of the 8th?

A. I drove part way down there. I drove within about fifty miles of Santa Paula, and we stopped and slept.

Q. Where? In Ventura? [200] A. No.

Q. Santa Barbara?

A. Just north of Santa Barbara.

Q. Ollum or some place like that?

A. No, we stopped right on the coastline.

Q. You slept out, that night?

A. Yes, sir.

Q. And you slept under your truck?

A. Yes, sir.

Q. The boy slept in the truck?

A. My son slept in the truck; yes, sir.

Q. This truck had no regular sleeping unit?

A. No, sir.

Q. He just slept on the seat? A. Yes, sir.

(Testimony of Gilbert Ripka.)

Q. He was small enough, he could just lay on the seat?  
A. Yes, sir.

Q. That was the morning of the 8th; was it not?

A. Yes, sir.

Q. And how much sleep did you get that night?

A. Oh, I believe it was about 11:00 p.m. when we stopped and it was around 8 when I woke up.

Q. You think you got a good nine hours sleep?

A. Yes, sir.

Q. You slept all right; did you? [201]

A. Yes, sir.

Q. Did you have a sleeping bag or a mattress you slept on?  
A. I had a thick Army comforter.

Q. How thick was the Army comforter?

Q. Doubled up, it would be sufficient to a light mattress.

Q. Did you tell me whether you had any fog on the coast there that night; July 8th?

A. There was some fog there, that night on the coast.

Q. Didn't you get a little cold?

A. No; not there I didn't. Not the point I slept, I didn't.

Q. You slept well; did you?

A. Yes, sir; very well.

Q. You woke up well refreshed; ready for a good day's work?  
A. Yes, sir.

Q. You started out with your boy, and drove over to Santa Paula?  
A. Yes, sir.

Q. When you got to Santa Paula, you reported to one of those lemon ranches; something like that?

(Testimony of Gilbert Ripka.)

A. I called Sunkist Growers in Los Angeles.

Q. And they told you which warehouse to go to?

A. Yes, sir.

Q. You took on some fresh produce?

A. Took on boxed lemons.

Q. Boxed lemons? [202] A. Yes, sir.

Q. Did you fill your refrigerator box with these boxed lemons? A. No, sir.

Q. Do those have to be iced? A. Yes, sir.

Q. And did you get ice, too, at Santa Paula?

A. Yes, sir; a small amount.

Q. What time did you leave Santa Paula?

A. It was about 11:00 p.m.—or 11:00 a.m., rather.

Q. Just before noon? A. Yes, sir.

Q. And do you know what your gross weight was? A. I don't remember.

Q. Could I ask you this; how long was your equipment, from bumper to rear?

A. From the bumper to the rear of the trailer?

Q. Yes.

A. Forty-five feet, ten inches.

Q. Forty-five feet, ten inches long. And can you tell me how wide your box, refrigerator box was?

A. The trailer?

Q. Yes. A. Ninety-four inches.

Q. Ninety-four inches. And how long was the tractor part? [203] This is the complete outfit here; forty-five feet? A. Yes, sir.

Q. Just the trailer part; how long is that?

(Testimony of Gilbert Ripka.)

A. The trailer part was thirty-four feet, four inches; outside measurement.

Q. And what is the length of the—is that the trailer?      A. Yes, sir.

Q. The tractor is what?

A. What would you have reference to; from what part?

Q. The tractor; the motor part; the complete unit.

A. I couldn't tell you that, because I have never measured it.

Q. About fifteen feet? It would be the difference—no.      A. No, sir.

Q. Because this overlaps?      A. Yes, sir.

Q. How much of it overlaps?

A. The fifth wheel was mounted fifty-five inches from the back of the cab. It also had what we call a thirty-four inch kingpin on it. The center of the fifth wheel was fifty-five inches—fifty-four or fifty-five inches from the back of the cab; had a standard kingpin setting, which is thirty-four inches for that type trailer.

Q. Now, can you tell me—let's start at the back of that refrigerated equipment, and count forward. How many wheels [204] are there on that equipment?      A. You mean axles, or wheels?

Q. Actual wheels. Let's take the axles first. How many axles?      A. Four axles.

Q. That is on just the refrigeration equipment?

A. Two axles on the refrigeration.

Q. Two axles there?      A. Yes, sir.

Q. Those are at the very rear of the refrigeration

(Testimony of Gilbert Ripka.)

equipment?           A. No, sir.

Q. Where are they located?

A. The center of the tandem, I believe, was one hundred one inches from the back of the trailer.

Q. About ten feet—nine or ten feet from the rear of the trailer, forward?

A. Eight ninety-one inches, or one hundred one inches.

Q. To the first axle?

A. No. It would be to the center of the tandem axle. The tandem axles are forty-one inches apart.

Q. So the trailer has only two axles?

A. Yes, sir.

Q. How many wheels on each axle?

A. Two. [205]

Q. On each side?           A. Two wheels.

Q. So that you had a pair of duals on each side of the trailer?           A. Yes, sir.

Q. Now, how many axles on the tractor?

A. Two.

Q. Just the driver axle, and the——

A. Steering axle.

Q. Steering axle. You had duals there, too?

A. On the drive axle; yes.

Q. What is the tread on those tires you had at that time; how wide would it be?

A. I believe those treads are ninety-four inches.

Q. You mean from the center of tread to center?

A. No; the outside of the dual.

Q. The outside of the dual, to the outside of the next dual?           A. Yes, sir.



(Testimony of Gilbert Ripka.)

Q. How wide were the tires that were on those?

A. You mean how wide the duals were?

Q. Yes. No; just each tire. I don't mean the duals, but just each tire.

A. They have been measured, but I don't recall.

Q. They would leave a considerably wider mark than an ordinary automobile tire would they [206] not?

A. Yes, sir.

Q. And how much did this equipment weigh, when you finally reached the point where this accident happened, with the load you had?

Mr. Wilmer: You mean the load and the equipment?

Mr. Palmquist: Gross weight; everything.

A. That I couldn't tell, because of the reloading and melting of the ice.

Q. (By Mr. Palmquist): Can you come within a couple of thousand pounds of it?

A. When the truck was loaded and iced fully, at Bakersfield, the gross weight was fifty-eight thousand, eight hundred pounds.

Q. Fifty-eight thousand and what?

A. Eight hundred pounds.

Q. Eight hundred pounds. That is with full gas tanks?

A. Yes, sir.

Q. Was that an actual weighing slip that you received?

A. Yes, sir.

Q. Now, what kind of gears do you have in that, in the way of forward gears?

A. I have a five-speed main transmission, and two-speed auxiliary.

(Testimony of Gilbert Ripka.)

Q. Altogether, how many gears is that?

A. Ten speeds forward.

Q. Ten speeds forward? A. Yes. [207]

Q. And with a combination of each speed forward? A. Yes, sir; with a combination.

Q. Altogether, you have got something like forty different choices; is that right?

A. No; you have ten choices. First low, first high, second low, second high, third low, third high, and on up. I have nine choices on that, because with overdrive, the fifth is an overdrive gear and you do not split the overdrive gear. You have a fifth over and direct in the auxiliary only.

Q. You have close to thirty choices, haven't you?

A. No, nine choices forward. You have first low, first direct, second low, second direct, third low, third direct, fourth low, fourth direct and fifth overdrive, which is a direct gear, and auxiliary.

Q. All right. Now, on level pavement with that kind of weight, what kind of speed could you make?

A. The maximum speed—that truck would make around sixty-one miles an hour.

Q. Sixty-one miles an hour?

A. Yes, sir. That is maximum speed?

Q. Was this a diesel? A. Yes, sir.

Q. Now, when you left Santa Paula, where did you go?

A. I went to a little town by Bakersfield.

Q. Do you know the name of it? [208]

A. I believe the name was——

Q. Oilfield?

(Testimony of Gilbert Ripka.)

A. No, sir; east side of Bakersfield. Edison.

Q. Edison. All right. To get from Santa Paula to Edison you had to cross the Tehachapi range; did you not?

A. Yes, sir.

Q. You went over the Grapevine Ridge?

A. Yes, sir.

Q. And you left Santa Paula, you say, about 11:00 o'clock that morning?

A. Yes, sir.

Q. What time did you arrive at Edison?

A. I arrived at Edison about 5 in the afternoon—on; 4:30 in the afternoon, because I called to see if they were still open.

Q. And can you tell us what the mileage is from Santa Paula to Edison?

A. I believe it is one hundred thirty-eight miles.

Q. Most of it is mountainous driving, isn't it.

A. Yes, sir.

Q. You didn't take the back road, did you; you came the regular 99?

A. I came directly over 99, I believe it was State Highway 38 or something like that.

Q. Yes; all right. Using that road, you couldn't—at no [209] time did you reach your sixty-one maximum, did you?

A. I could have, but the speed law in the state of California won't permit it.

Q. All right. Anyway, when you arrived in Edison was there a place where you knew right where to go, and what to do?

A. I had to inquire where the place was, and I

(Testimony of Gilbert Ripka.)

didn't know exactly how much I was to pick up there; but I knew I was to finish out my load there.

Q. You did that? A. Yes, sir.

Q. What time did you finish that?

A. It was about 6:00 p.m.

Q. Then what did you do?

A. Went back into Bakersfield put on ice, fuel. I took on some fuel and we ate supper there.

Q. Can you remember what the temperature was? This is July 9th. A. Yes, sir.

Q. Do you remember what the temperature was there in Bakersfield, July 9th that year?

A. No; I don't. It was very hot.

Q. Bakersfield reminds you of some parts of Arizona in the summer?

A. Bakersfield reminds me of Bakersfield.

Q. Anyway, after eating there—where did you eat there, [210] by the way; do you remember?

A. I don't recall the name of the place. I have eaten in there before. It is a little restaurant on Highway, I believe, 466.

Q. A place where you could pull your equipment up in front, and kind of keep an eye on it, while you ate? A. Yes, sir. That is right.

Q. Then after eating, you started out about what time? A. About 8:00 p.m.

Q. About 8:00 o'clock. Then where did you drive? A. I drove as far as Mojave.

Q. That took you through the Tehachapi Pass; didn't it? A. Yes, sir.

Q. That was all mountainous driving, wasn't it?

(Testimony of Gilbert Ripka.)

A. Yes, sir.

Q. Do you know what that mileage was?

A. Offhand, I believe it is around one hundred miles.

Q. You climbed from an elevation at Bakersfield of some five hundred feet, up to what; do you know; getting over that pass?

A. I don't recall what the elevation is. It is not too bad; it is not too high. It is not too hard of a pull.

Q. It was hot, was it?

A. After we left; got part way up the pass, it had cooled off, considerably. [211]

Q. When you got to Mojave, was it hot at Mojave? A. No, sir.

Q. What time did you get into Mojave?

A. It was about 11:00 p.m.

Q. What did you do at 11:00 p.m., then?

A. Decided it was cool there, so I decided I would sleep there for a little while. My son laid down in the seat; he was getting tired, and I thought, "I will lay underneath the trailer on my comforter." I slept until about 7:30 the next morning.

Q. You had about eight and a half hours sleep, then? A. Yes, sir.

Q. That was an undisturbed sleep?

A. Yes, sir.

Q. And you felt rested, did you?

A. I felt very good after that hot weather.



(Testimony of Gilbert Ripka.)

Q. Well, the only time I have been in Mojave, it was hot. Didn't you find it hot?

A. No, sir. Not Mojave, it wasn't hot that night. There was a very cool wind blowing.

Q. You cross from there over to Barstow; don't you?      A. Yes, sir.

Q. You are really on the desert in there; aren't you?

A. The desert doesn't start—the hot part of the desert doesn't start until you get on east of Barstow. I haven't [212] found it too hot from Mojave to Barstow.

Q. What time did you start the next morning?

A. We left Mojave about 8:00 a.m.

Q. This is the morning of July 9th, now?

A. Yes, sir.

Q. You drove from there, on to the place where this accident happened, except for a short stop at Kingman; is that correct?

A. No, sir. I stopped at Needles for about—for a coffee break. We stopped at Needles for about fifteen or twenty minutes; then went on to Kingman, checked through the port, and stopped in Kingman about 4:00 in the afternoon; and was awakened about 7:30 by a friend of mine.

Q. How much sleep do you think you got in Kingman?      A. A good three hours.

Q. Do you know what the mileage is from Mojave on, over to the place where this accident happened?      A. Offhand; no, sir, I don't.

(Testimony of Gilbert Ripka.)

Q. By the way, you weren't using any NoDoz tablets yourself, were you?

A. No, sir. I don't use them.

Q. Have you ever used them? A. No, sir.

Q. You don't know what they are?

A. I take it back. I had used them years ago. I know they [213] leave you very nervous and upset. That is the reason I don't use them.

Q. NoDoz?

A. NoDoz, no sleep; anything like that.

Q. Do you know how long they have been on the market?

A. They have been on the market several years.

Q. They are just caffeine, aren't they?

A. I believe so; I am not sure.

Q. Like a cup of coffee. Does coffee leave you nervous, upset? A. No, sir.

Q. You drink coffee when you drive?

A. Yes.

Q. It is one of the best things you could drink, when you drive? A. To a certain extent; yes.

Q. All right. Did you have any coffee after you left Kingman? A. No, sir.

Q. Did you have any at Kingman?

A. Yes, sir.

Q. And how much?

A. I don't recall. It would have been two, possibly three cups.

Q. I have never driven a truck like that; but I have driven [214] an automobile. A trip like that,

(Testimony of Gilbert Ripka.)

driving a truck like that, is more difficult than driving an automobile?

A. To me it isn't. I would rather drive a truck than I would an automobile.

Q. In a truck, you are pretty safe, aren't you? You are up above most of the traffic?

A. I believe our seats are more comfortable, more support.

Q. In a truck, where your feet hit the floorboard is about the top of the average automobile, isn't it?

A. No, sir.

Q. You look way over the tops of ordinary automobiles? A. Yes, sir.

Q. And I might ask you; do you know what this little Hudson would weigh, that you came into collision with?

A. Possibly, about thirty-eight—about thirty-eight hundred. Thirty-eight hundred to four thousand pounds. I don't think it would run over thirty-eight hundred.

Q. When fifty-eight thousand pounds hits thirty-seven hundred pounds, the thirty-seven hundred pounds stops right now?

Mr. Wilmer: If it please the Court, we object to that as argumentative.

Mr. Palmquist: I will withdraw the question to avoid the interruption.

Q. (By Mr. Palmquist): How did you feel as you were coming [215] along there from Kingman, or driving this big diesel equipment; did you feel good? A. Yes, sir; I felt very good that day.

(Testimony of Gilbert Ripka.)

Q. You were relaxed, were you?

A. Yes, sir.

Q. And those Diesels get so they purr, don't they?

A. To a certain extent, yes.

Q. And you weren't sleepy at all?

A. No, sir.

Q. Not at all. You were wide awake?

A. Yes, sir.

Q. This was about 3:00 o'clock in the morning now?

A. Yes, sir.

Q. Now, we come to the part that concerns us here; this curve where this accident happened. You recall that?

A. Yes, sir.

Q. You remember coming into the curve?

A. Yes, sir.

Q. And you remember before you got to that curve you had been on a straight stretch there for some little bit?

A. Some upgrade. Just a ways before the curve I had to gear down; and possibly half or three-quarters of a mile before the curve, I was in a lower gear. And after topping the grade, I went back into my direct gear. I wasn't running in overdrive that night on account of waiting on this friend [216] of mine.

Q. You were able to pick up a little more speed when you were on this straight stretch?

A. Yes, sir. I was running between forty and forty-five, after gaining my speed back again off of the grade.

Q. You would have been going faster, except

(Testimony of Gilbert Ripka.)

there was a Mr. Solomon, a friend of yours, that you had lent a tire to?      A. Yes, sir.

Q. He had had some tire trouble?

A. Yes, sir.

Q. You were kind of expecting him to catch up to you?

A. I was more or less waiting for him because he had a larger rig and heavier load.

Q. There was nothing about the weather that caused this accident, was there?      A. No, sir.

Q. You could see well?

A. Vision was very good that night.

Q. Clear?      A. Clear; yes, sir.

Q. There weren't any thunderstorms that put down a blinding rain like we had at noon today, that would obstruct your vision?      A. No, sir.

Q. No fog?      A. No, sir. [217]

Q. And obviously no water or ice on the pavement; nothing like that?

A. No, sir. I also made the remark that the bugs were very few that night.

Q. Even few bugs?      A. Yes, sir.

Q. So as you rolled along there, you came to the point where you saw this curve to the right?

A. Yes, sir.

Q. You never did make that curve, did you?

A. No, sir.

Q. As a matter of fact, if you drew a straight line down the highway you had been going on, to where your truck finally came to rest it would be straight, wouldn't it, out of that lane?



(Testimony of Gilbert Ripka.)

A. I believe so. I had started to enter the curve and dropped off on the bituminous before getting to the curve.

Q. Now, let's see; this trailer of yours was a little over eight feet wide, wasn't it?

A. Yes, sir.

Q. There is twenty-two feet of pavement, so that you had eleven feet as your half of the road?

A. Yes, sir.

Q. And that meant that if you kept your duals on the pavement on the right side, that left edge of your trailer is [218] riding pretty close to that center line, isn't it?

A. Would you restate the question, please?

Q. If you had your right duals on all pavement, that would put the left side of the refrigerator box of your equipment pretty close to the center line, within a foot, wouldn't it?

A. Depends on whether you are riding the edge of the concrete or riding the center line. If you are riding the center of the lane, you would be about a foot and a half from the center line.

Q. Anyway, because of this curve, and because you saw somebody coming, and because of the width of your equipment, you got over as far to the right as you could?

A. Yes, sir. Also there is a sign there that says, "Slow vehicles keep to right."

Q. Do you read those signs as you go down the highway at 3:00 o'clock in the morning?

A. I notice them, yes, sir.

(Testimony of Gilbert Ripka.)

Q. Are you sure you noticed it that night or do you think someone called that to your attention later, when they were talking about this case?

A. No, sir. No one called it to my attention.

Q. 3:00 o'clock in the morning, July 10th, you saw that sign that said what?

A. "Slow vehicles keep right."

Q. Maybe that is why this accident happened, because you [219] were looking at the sign instead of the traffic, could that be?

A. No, sir. I don't have to look at a sign on the highway, you train yourself to have split vision to read signs and still keep your position on the highway.

Q. You had never been over this road before, had you; this was a new experience to you?

A. Yes, sir.

Q. And this sign you are talking about—I don't know with my glasses if I can read this or not; I am referring to Plaintiff's number 23. It is right there at the start of the curve, isn't it. Is that correct?

A. Yes, sir.

Q. Let me see if I have a pen. I will put an ink arrow pointing to that sign. That is at least eight, nine, maybe ten feet off the edge of the pavement, isn't it?

A. Yes, sir.

Q. And you are going uphill there, aren't you?

A. No, that is more or less flat, right there.

Q. Aren't you going up a grade—but you were getting ready to go into a grade?

(Testimony of Gilbert Ripka.)

A. The grade starts over here.

Q. You weren't giving it a little extra power to get up a little more momentum for that grade, were you?

A. No. I was running about forty-five.

Q. So you saw that sign, didn't you? [220]

A. Yes, sir.

Q. So, one thing we can be certain of, is when this accident happened it happened some place past that sign, didn't it?

A. Yes, sir.

Q. And that sign is marked on Plaintiff's Exhibit number three here by somebody down here—I will draw a circle around it. I will call this "R-1." You say that sign says, "Slow vehicles keep right"?

A. Yes. Either, "Slow vehicles," or, "Slow traffic keep right."

Q. I have asked you this before; but I want to make certain of this. And you are certain you did see that sign?

A. Yes, sir.

Q. You are certain you read it, and understood it?

A. Yes, sir.

Q. Paid attention to it?

A. Yes, sir. Because I was looking for a four-lane highway going up the grade and pulling off to the right. That is the usual procedure, when you see a sign of that type; as a rule, there is a four-lane highway or truck lane to the right of the regular lane.

Q. All right. Now, it is about 3:00 o'clock in the morning when this happened, when you saw this sign?

A. Yes, sir. [221]

Q. Was your boy wide awake with you, then?

(Testimony of Gilbert Ripka.)

A. He is sleeping.

Q. He is sleeping? A. Yes, sir.

Q. Do you fellows have any radios in those cabs?

A. Yes, sir.

Q. Do you have one? A. Yes, sir.

Q. Did you have it going?

A. At that time, I don't believe I did because I had my little blower motor going, and the firing of it affects the radio.

Q. Something like trying to listen to a radio in an airplane?

A. My son used to call it a machine gun.

Q. Anyway, at that time you are off the—I have got counsel making a truck for me here, as soon as I get this truck—the whole thing is ninety-four feet five inches, ninety-four inches wide. Now, when you passed that sign, if I understand you correctly, you had pulled to the right and were way down here?

A. I had pulled off before, pulled on the bituminous before getting to the sign.

Q. As you came along here, you were way off on this (indicating)? [222] A. Yes.

Q. When you say “way off” what was the furthestest you got over there?

A. I didn't say way off. I said I was off of the concrete on the bituminous.

Q. I was going by your deposition. You were about five feet off, were you?

A. No, sir. I was about five feet from the center line.

Q. The left side of your trailer would be five feet

(Testimony of Gilbert Ripka.)

from the center line?           A. Yes, sir.

Q. I measured down there, this red, dotted line, five feet. At no time was the left side of your trailer past that?           A. After I pulled off; no.

Q. Well, at no time did you ever go to your left from that time on, even until after the accident happened, is that correct—I mean before the accident happened?

A. Before the accident happened. No, sir; I didn't go to my left.

Q. So that we know up here to "R-1" the accident hadn't yet happened. So that you were still, up to "R-1," with at least five feet between the center line and you; right?           A. Yes, sir.

Q. This is a little short, I am told—do you have one of those magnet things? [223]

Mr. Scoville: Yes.

Q. (By Mr. Palmquist): This is just a little short; but if we laid your tractor, that according to this, just about puts you off onto the—as you came along here, puts you off on the black surface; is that right?

A. Put the right duals on the bituminous.

Q. Now, I should think when that happened there would be no doubt in your mind about it. You can sit in your cab, can't you, and as you listen to the sounds—you sort of drive those things by the sounds they make?

A. By the sound and by the feel of them, yes, sir.

Q. There is no doubt in your mind about that



(Testimony of Gilbert Ripka.)

because you knew what kind of a sound—I am just going to draw your truck in here at “R-1.” Mr. Scoville, will you come and give me some support?

This would be your tractor, coming along there. And the dual wheels would be on this, wouldn’t they?

A. That is right.

Q. And the dual wheels of the trailer would be in here, wouldn’t they? A. Yes, sir.

Q. And your speed at that time was how fast?

A. Between forty and forty-five miles an hour.

Q. Forty to forty-five miles per hour. Now, at that time, when you were here, were you aware of the Sanders’ automobile? [224] A. Yes, sir.

Q. Where was the Sanders’ automobile, at that time?

A. At that point it was about where the trailer is now, or on to the east a little further.

Q. Could you step down here. This is not quite to scale, but almost: Would you hold it where you saw it. Do you understand the map? I want to be absolutely fair with you. This is westbound in here, from here to here. I will draw a line in that shows the center line. That should be put in a different color. That is the center line. The edge of the pavement is here. Do you see where the engineer shows the edge of the pavement. Of course you are over here. This is eastbound, do you see; this is westbound. Have you got that? A. Yes.

Q. Then this is the edge of the bituminous surface. Where you were pointing, you were pointing

(Testimony of Gilbert Ripka.)

to the Sanders' car being way off the pavement. I am sure you didn't mean that, did you?

A. No, sir.

Q. Do you understand the map now, do you think? A. What scale is the map?

Q. It is one inch equals three feet. Now, we have a scale here. One foot there, two feet, four feet. Could you tell us this; how far was the Sanders' car from you at that time? A. At this point here?

Q. Yes. [225]

A. Approximately right in about here. I wouldn't say that is an exact answer. This map doesn't, for the scale, show the curve.

Q. You lose the curve in this enlargement. When you see it there it looks right, doesn't it?

A. Yes, sir.

Q. Just go over and place that little car where you think it was. I will try to help you. How far do you think it was in front of you; one hundred fifty or two hundred, half a mile? How far ahead would it be from you? That would be thirty-six, that would be seventy feet, make it one hundred over here. We indicated over there it would be about one hundred. Is that about right?

A. The car would be about in here (indicating).

Q. A little over one hundred feet then you think; one hundred feet of highway, separating you and the car? A. Yes, sir; in this area.

Q. Will you hold it about where you think you saw it there; and I will draw around it. It was on its side of the highway, was it?

(Testimony of Gilbert Ripka.)

A. At one hundred feet, I would say yes, it was.

Q. I will draw it in there. And it, of course, was eastbound, wasn't it? A. Yes.

Mr. Wilmer: Westbound. [226]

Q. (By Mr. Palmquist): Westbound, pardon me. It was, I understand, pulling a luggage trailer of some kind? A. Yes, sir.

Q. Was it, at that time, on its side of the road?

A. Yes, it was, as far as I remember it was, yes.

Q. Let's call your truck, here at "R-1," "R-1A," meaning that is where you read this sign, "Slow vehicles keep right."

A. I read the sign down here. I wasn't at the sign at the time I read it.

Q. You measure back here. That would be about seventy some feet?

A. I wouldn't give a definition exactly how many feet it was, because you are trained to use a split vision.

Q. I understand.

A. Therefore, I can look at the Judge and see you also.

Q. That is right. You don't have tunnel vision, you mean? A. That is right.

Q. But when you are looking at me now, you can't see the Judge? A. No, sir.

Q. This circle called, "R-2," being the Sanders' car. You had seen this car coming—will you be sure to keep your voice up—when you saw the Sanders' car at "R-2," you had seen him coming around some curves, hadn't you?

(Testimony of Gilbert Ripka.)

A. I had seen him as he started down the grade, or he was [227] partly down the grade.

Q. Yes. Let's go back to this map. This map is Plaintiff's Exhibit 1. That big map you see is the space between these two areas, do you see that?

A. Yes, sir.

Q. This sign we are talking about is in here and you are in here. You see the Sanders' car, you had seen the Sanders' car coming along, making this curve, hadn't you?

A. I had seen him, when he started down the grade.

Q. Will you take your seat, please. As a matter of fact, you had seen him for at least a half a mile, hadn't you?

A. I would say more or less three-quarters of a mile.

Q. Three-quarters of a mile. He had been coming downhill and had to make turns, isn't that correct? You had seen him coming from way back over there?

A. About this point.

Q. Let's put an ink arrow there. Will you step here and use this as a tape, if you will; just take that and make the arrow, where you first saw him coming.

A. The scale of this map gets smaller, shows the highway smaller. It possibly would be in this area here.

Q. All right.

A. That wouldn't be exact, because the scale of

(Testimony of Gilbert Ripka.)

this map gets smaller the way the photograph is taken.

Q. I will put an arrow down to that end, and we will call this [228] "R-1," meaning that is the mark you made there. That is Plaintiff's Exhibit number 2. You at that time would be some place in here? A. Back down this way further.

Q. You would be back off this way?

A. Yes, sir.

Q. Not even into the picture yet?

A. No, sir; I don't believe so.

Q. But you had a straight stretch and level, didn't you, up to where the accident happened, correct? A. Yes, sir.

Q. From this point we are talking about now. And the man coming in the opposite direction was coming around some curves and coming downhill, wasn't he?

A. Yes, sir. I presume there were curves in that section of the highway.

Q. Will you be seated, please. You understand, of course, that one of the problems involved here, is whether or not Mr. Sanders' was asleep, isn't that correct? A. Yes, sir.

Q. And you understand Mr. Sanders is unable to be here to tell us whether he was or not?

A. Yes, sir.

Q. You wouldn't expect a man asleep, to have gone around those curves you saw that car come around? [229]

Mr. Wilmer: If it please the Court, that is



(Testimony of Gilbert Ripka.)

not proper cross-examination, what he would expect or would not expect. It is invading the province of the jury.

Mr. Palmquist: I withdraw the question.

The Court: Let's proceed, counsel.

Q. (By Mr. Palmquist): You kept watching this car right up until you got to this point?

A. I didn't keep watching it directly, no. I kept it in my vision. That is not a habit of watching one vehicle. Keep it in your vision, but you don't look directly at it. That is a very poor way of driving.

Q. You were in a position so that if that car had been exceeding the speed limit or driving recklessly or fast you would have been able to see that?

A. Yes, sir.

Q. Would you tell us what judgment, if any, you formed as to the speed of that car when you saw it coming around that curve and at that distance shown by the picture the jury has been looking at?

A. I judge the speed of the other vehicle about the same as mine, about forty or forty-five miles an hour.

Q. About the same as yours? A. Yes, sir.

Q. It was on its own side of the road, was it?

A. It seemed it be, up to a few feet before the accident. [230]

Q. Its lights were burning, is that correct?

A. Yes, sir.

Q. Did you notice whether that car weaved back and forth from side to side on the road?

A. I don't believe it did.

(Testimony of Gilbert Ripka.)

Q. That isn't a matter of belief, it is a matter of fact. If you don't know, please say so. Did it or didn't it? A. No, sir, it didn't.

Q. That car came as straight as an arrow, didn't it? A. Yes, sir, as far as I know it did.

Q. It stayed on its side of the road, didn't it?

A. It did up to the few feet before the impact.

Q. I understand. And it didn't vary its speed, it didn't slow or increase its speed, did it?

A. That I don't know.

Q. As far as you were concerned it had split the distance in about half to the midway point from where you were when you first observed it until where you met it, it traveled about the same distance you had?

A. It traveled about the same distance.

Q. That is one of the things you observed that made you observe it was going about your speed, isn't that right? A. Yes, sir; that is right.

Q. When you looked at this car and saw it coming you were kind of looking off to the right. The road was straight ahead [231] of you and this car was off over here, coming around these curves and it crossed in front of you and made this curve, didn't it?

Mr. Wilmer: If it please the Court, unless counsel specifies what curves he is talking about I object to the form of the question.

The Court: He may answer. There is a gesture in there.

Mr. Palmquist: A gesture from my right, your Honor, across the front of me to my left.

(Testimony of Gilbert Ripka.)

A. Using split vision I didn't have to look to the right.

Q. (By Mr. Palmquist): What do you mean by this split vision?

A. You use a split vision in the Army, which I was trained for. I can see the man on the right of me and I can see the man on the left of me. By looking split vision I can look ahead and still spot something off to my right or off to my left.

Q. Well, we all have panoramic vision, I believe. I can see this man over here; I can see Mr. Scoville. I am concentrating on you, yet I can see his Honor, the court reporter. We all have panoramic vision, is that what you mean?

A. We do to a certain extent. Some of it is exercised more than others. In other words, some of us are trained to use our split vision more than others. [232]

Q. What you mean, you weren't looking down a telescope down the middle of the highway?

A. That is right.

Q. What I am trying to get at, if I was there in your position driving this truck that night, when I first saw Mr. Sanders' car, when I looked at it directly I would have to turn my head like that. It would have been over here, wouldn't it?

A. The average person would have.

Q. You didn't have to do that because you were trained in the Army and so forth with this split vision?

A. Yes, sir.

(Testimony of Gilbert Ripka.)

Q. You made these observations with this split vision?      A. Yes, sir.

Q. Were there any vehicles traveling behind the Sanders' car?      A. No, sir.

Q. Were there any vehicles traveling behind you?      A. I don't believe there was at that time.

Q. Will you tell me in your own words how this accident occurred?

A. I got almost to start into the curve and it seemed like this automobile just drove over in front of me. About seventy-five feet from me it seemed like it crossed over all at once. [233]

Q. He dove. You use that word advisedly, "dove," is that correct?

A. What do you mean by "advisedly"?

Q. Well, you said "dove." When you said "dove" I am thinking of someone diving into a swimming pool or jumping. You say the car dove in front of you?      A. You use the word dart then.

Q. Well, like a child ran between—you are here and he is back up here. Now, where in between this spot "R-2" and "R-1A" that this dove took place, this dive? Would you come down here?

A. I couldn't give the exact spot.

Q. I realize you weren't out there with a stop watch or steel tape.      A. That is right.

Q. You weren't expecting an accident to happen, were you?      A. No, sir.

Q. But you must have some basic idea, don't you?

A. All I remember, it seemed like the car came

(Testimony of Gilbert Ripka.)

up in a position like this and just shot over like this.

Q. Just take this—this makes a nice mark we can all see. We realize you didn't measure it but just approximately. We have got you established here and we have got Sanders established there. If you can't do it say so.

A. I don't believe I can do it. At a time like that it is [234] very hard to. If I did it would simply be by figuring by the map and it wouldn't be an exactly true answer.

Q. We are not going to hold you to an exactly true answer. Let me ask you this. Did he dive back here at "R-2"?

A. No, he was up in here further.

Q. Then you do have some idea approximately where it happened, don't you?

A. Approximately right in here is where it dove in. That is not exact because the map——

Q. You were indicating a maximum and a minimum. Can you give me the maximum and minimum where this dive took place?

A. The minimum would be about here; the maximum would be about here (indicating).

Q. The thing I want you to do for me, show me the position of your truck at the end of this dive, where he struck you. Were you still five feet from the center line?

A. As far as I know, yes. I followed the bituminous and I stayed on the bituminous with my right duals. You can feel when you get on the concrete.

Q. You hadn't done any diving toward him?



(Testimony of Gilbert Ripka.)

A. No, sir.

Q. You stayed right where you were moving along here? A. Yes, sir.

Q. Keeping in mind this is the front of your truck, put your truck in the position it was at the instant he completed [235] this dive into you, as he struck you. You just hold it there so we can see the position.

A. I am afraid I couldn't at that moment. It is pretty hard to fix that.

Q. Let's take the moment before he struck you, the moment before he started this dive, can you do that? A. I don't believe I can do that either.

Q. Where did the accident take place?

A. It took place right in here.

Q. All right, will you take and draw a big circle where you saw it take place?

A. I think it took place here, I am not sure, because at a time like that that is something that won't register. And I was slightly unconscious at the time.

Q. You were slightly unconscious at the time?

A. After the impact.

Q. You weren't slightly unconscious just before the impact? A. No, sir.

The Court: At this time, Gentlemen, we will recess for ten minutes.

(Recess.)

Q. (By Mr. Palmquist): Mr. Ripka, would you step down here now. Just before the recess you had taken and drawn a circle where the accident happened the best of your ability, [236] and I am going

(Testimony of Gilbert Ripka.)

to follow over with a black dotted line the red line you made. I want you to watch me. This is correct, isn't it?

A. That is the line I made, yes, sir.

Q. Is that correct?

A. That is the line I made.

Q. We have "R-1," "R-1A" and "R-2." We will label that "R-3."

Will you take your seat again, please. Mr. Ripka, I had asked you to tell us in your own words when you were at "R-1A," and Mr. Sanders was at "R-2," and you said when the car was about seventy-five feet, I believe, is that what you said?

A. Yes, sir.

Q. Your attorney, Mr. Wilmer, suggested in opening statement that it was fifty feet. Was it fifty feet or seventy-five feet?

A. About seventy-five feet.

Q. About seventy-five. Do you know how long this courtroom it?

A. This courtroom is approximately fifty feet.

Q. So it was about half again the length of this courtroom between you, the front of Mr. Sanders' car and the front of you, when he made this dive, as you call it?

A. The courtroom is more than fifty feet. [237]

Mr. Palmquist: Could I ask the Court, does anyone know what the size of the courtroom is?

The Court: I don't have any idea.

Mr. Wilmer: If counsel likes I will step it off.

Mr. Palmquist: I would appreciate that.

(Testimony of Gilbert Ripka.)

(Counsel steps off distance in courtroom.)

Mr. Wilmer: Nineteen.

Mr. Palmquist: About sixty feet.

Mr. Wilmer: Yes, I would say that.

Q. (By Mr. Palmquist): So it was a little more space from that wall to this wall between you and the other car when it made this dive?

A. Yes, sir.

Q. Can you think of any other words besides this word dive—dove, I guess you said?

A. Dart, dove.

Q. Dart or darted. You mean there is something uncertain in your mind about this that makes you quite unsure how to describe what happened?

A. No, sir, nothing uncertain in my mind.

Q. What you are sure of is that your vehicle came into collision with the other vehicle, right?

A. Yes, sir.

Q. No question about that?

A. No, sir; no question about that. [238]

Q. No question in your mind it was the left front corner of your bumper that was first involved?

A. That I wouldn't say, it was the left front bumper, the edge of the bumper or in front of the left front wheel.

Q. But at least in one of those pictures it showed your left front bumper bent right back, it took quite a force, didn't it?

A. Not too much at that point.

Q. And "R-3," so we can understand it, is what you drew to the best of your ability where the ac-

(Testimony of Gilbert Ripka.)

cident happened, is that correct?           A. Yes, sir.

Q. You couldn't make it any more specific than that?           A. No, sir.

Q. Did you hang around out there and help pick up some stuff out there?           A. No, sir.

Q. But just for the purposes of illustration now and nothing else, you had not yet gotten into the curve, is that right?

A. Just starting into the curve slightly.

Q. The other car was over here some place and you were back down here like this, right, with your duals off—if this is the edge of the pavement—off on the black top, right? [239]           A. Yes, sir.

Q. And about five feet you figure between the center line, right?           A. Yes, sir.

Q. So apparently when this car dove, as you call it, you mean turned?           A. Turned.

Q. Turned. Now, if you had gone straight ahead you would have gone off the highway?

A. Evidently, yes.

Q. And it was necessary for you to swing to the right, wasn't it?           A. Yes, sir.

Q. If this car had gone straight ahead it would have gone off the highway over here, wouldn't it? Both vehicles had to do something with their wheels, isn't that correct?           A. Yes, sir.

Q. And so assuming this to be about seventy-five feet, when this car turned was it a gradual turn such as that, or was it a sharper turn?

A. It was a sharper turn.

Q. Would you come up here and kind of indicate,

(Testimony of Gilbert Ripka.)

just for the purpose of illustration, so we can follow you, how sharp that turn was?

A. I can't indicate on this map because it has too much [240] of a curve there.

Q. All right. Let's erase this and make the curve less then, for the purposes of illustration. Draw the center line first. Let's say the top of the black-board is toward Flagstaff. Put your truck down here or wherever it was. Now, show us the path of travel that car took.

A. This couldn't be exact; as close as I could remember it came on down and come over like that (indicating).

Q. About like that. What part of the car would that be?

A. That would be the front part.

Q. Would you just draw the car in in the position it occupied at that time?

A. Probably would have been in a position more like that.

Q. What would be the position of your truck at that time?

A. It would have been in a position like that (indicating).

Q. Now, let's erase carefully this car back here and put the trailer in. The trailer would be following that, wouldn't it.

Now, the forces that would occur would be first from your truck a force continuing from Flagstaff, right?

A. Yes, sir.

Q. Then that would be met by a force such as you have described, coming at an angle but in the



(Testimony of Gilbert Ripka.)

opposite direction, correct? A. Yes, sir. [241]

Q. Which would be followed by a drag, the trailer, something like that, right? A. Yes, sir.

Q. Which when this collision occurred would reverse this arrow, would it not, so that then became a force instead of a drag, correct? Because there would be a stopping here which would then make the weight so there would be a pushing effect. You experience that all the time when you drive these semis?

A. Not this type pushing effect, because your leverage is behind your wheels. Here is the wheels of the automobile; the leverage and your tension to turn is behind the wheels which gives it a different leverage.

Q. A car making a sharp curve like that would have a tendency to whip that trailer, wouldn't it? In fact, I went to the dime store today and bought myself a trailer and car. In other words, as long as this came along like this, as long as there is a pulling, that trailer will track, won't it?

A. Yes, supposed to.

Q. But the big difference between this kind of a trailer and a kind of a trailer that you had was that in your trailer you had air brakes, didn't you?

A. Yes, sir.

Q. And this could very well represent, could it not, your equipment, right? Is that correct?

A. To a certain extent, yes. [242]

Q. Yes. Now, if you have drawn on the board

(Testimony of Gilbert Ripka.)

when this car suddenly cut across, could that be about it like that?      A. Yes, sir.

Q. What?      A. I believe it would be, about.

Q. About like that. Now, when that happened your truck would have a tendency to stop this force here, wouldn't it?

A. If it was a direct force it would.

Q. Make it glance off?

A. If it was a direct force it would; if it was a glancing force it wouldn't.

Q. If that car turned like this would that trailer whip around like this (indicating)?

A. I believe it would.

Q. That is exactly what happened in this accident, isn't it?

A. That I couldn't say, I don't know.

Q. As a matter of fact, first it was this, it was this business, wasn't it, front to front like that? You think it was more like that (indicating)?

A. Yes.

Q. And when that happened that took off the left front fender here, didn't it?

A. I believe it did. I haven't seen—I wasn't able to tell too much of what happened out there after the accident occurred. [243]

Q. The front duals ran over that fender, didn't it?      A. That I don't know.

Q. Or still tearing away at it. And the left duals of the drivers ran over it?

A. that I don't know.

Q. It was sliding along underneath here, wasn't

(Testimony of Gilbert Ripka.)

it until where you got that undercarriage that holds the tire?      A. That I don't know.

Q. That was where it picked up that fender, didn't it?      A. That I don't know.

Q. Didn't you see that fender under there? I show you here—I am referring to Plaintiff's Exhibit 25. You see that fender under there? We have been told by other witnesses that that was the left front fender of this car.

A. I don't know whether it was or not.

Q. But you do have this undercarriage under that refrigerating equipment where you carried your spare tires?      A. Yes, sir.

Q. And that is the lowest part under the trailer, isn't it?

A. The tire carriers are above the axle, above the center line of the axle.

Q. These?

A. Yes, sir. These tire carriers are about that high off the ground (indicating).

Q. Are there air lines back in here? [244]

A. Up in the framework?

Q. Up in the framework, yes.

A. Yes, sir.

Q. As this fender came along there was an air line broken in the trailer, wasn't there?

A. No, sir.

Q. There wasn't?      A. No, sir.

Q. Was there one broken on the tractor?

A. There was one broken in the tractor, I believe off the compressor line.

(Testimony of Gilbert Ripka.)

Q. Up here? A. Yes, sir.

Q. Are these the same kind of air brakes they stop trains with, same kind of air brakes?

A. I don't believe the trains use the air emergency valve. By that I mean when the air is released or left off suddenly the trailer brakes set up and we use the air emergency valve on the trailer.

Q. That is what I am getting to. When this air line broke up here that set up the trailer brakes, didn't it? A. Yes.

Q. And they set like that (indicating) right now, don't they?

A. No, it wouldn't be that quick. [245]

Q. How quick?

A. It takes a few seconds for the air to drain into the pancakes or boosters, which takes quite a quantity of air.

Q. Would that make those duals slide?

A. No, it wouldn't on that trailer, not under thirty-two thousand pounds. If the back axle was loaded with thirty-two thousand pounds it would not slide on the type of highway that this was and the type tires that was on that.

Q. So you wouldn't get a sliding effect so much but you would get a pressure mark, wouldn't you?

A. More or less, yes.

Q. It wouldn't be like a black skid but it would be more like a movement being pushed forward and the wheels didn't go quite fast enough to keep up and you would get a rubber mark, right?

A. On some types of tire you might get a rubber

(Testimony of Gilbert Ripka.)

mark. On those there I don't believe you would get too much of a rubber mark.

Q. We have been told this is your trailer as it stopped there at the scene of this accident that night. Do you recognize it as your trailer?

A. Yes, sir.

Q. Are these the type tires you had there and the undercarriage for spare tires?

A. This is the undercarriage; this is the tires, yes. [246]

Q. Now, do you see leading back onto the highway there some marks leading right up to the rear wheels there?

A. Yes, sir, I see several marks.

Q. But do you see right there a mark that is obviously a dual wheel mark, right where I am pointing?

A. Yes, I see a mark there. I wouldn't say whether it was the dual wheels off of this trailer.

Q. It leads right up to this trailer, doesn't it?

A. I believe you can see it leads up to this point.

Q. We have some other pictures here. What is this I am pointing at here?

Mr. Wilmer: I wonder if counsel, for the purpose of the record, would be kind enough to let us know what he is referring to, because we can't see what he is referring.

Mr. Palmquist: Yes.

Mr. Wilmer: I am speaking, for the record, if you will indicate what you are referring to.



(Testimony of Gilbert Ripka.)

Mr. Palmquist: It appears to be, looks to me like dual wheels.

A. Those are mud flaps required by the Interstate Commerce Commission.

Q. Those are mud flaps, those are not wheels?

A. No, sir.

Q. All right. In other words, those aren't the edge of the two wheels there? [247]

A. No, sir.

Q. Those are mud guards? A. Yes, sir.

Q. Would you be seated, please. Now, would you step down again just a moment, and looking at Plaintiff's Exhibit 19, this is the picture with the patrol car at the read end. Now, do you see these two marks going along there as though they were made by duals, right where I am indicating? Let me put a little arrow there on Plaintiff's 19. You see then down here, and you see a wide tread, here is the edge of the wide tread right there and the edge of a wide one there. Will you look at those carefully. And then for the record, while the witness is looking at that Plaintiff's Exhibit number 25, I will put some arrows pointing to what we were just discussing regarding that picture. You see that?

A. Yes.

Q. Now, are those the kind of marks a dual wheel would make?

A. Yes, but that doesn't necessarily mean those marks were made by this trailer.

Q. I didn't ask you that, I asked you if those were the kind of marks a dual wheel would make?

(Testimony of Gilbert Ripka.)

A. Yes.

Q. All right. Would you be seated, please.  
Might I have this identified? [248]

(Plaintiff's Exhibit number 37 marked for identification.)

Q. I have here a picture in evidence which is an enlargement of the one the jury is now looking at. This is Plaintiff's Exhibit 19-A in evidence. I will make with this pencil again the arrow indicating the marks there and there; and here is the edge of the marks there. Here is one edge there coming down. You see those marks? A. Yes, sir.

Q. Now, I will label these arrows "R-1's." Now, we see some other marks in this picture. It looks like something went like this, doesn't it?

A. Yes, sir.

Q. It starts back here; it is here, is it not, and it is here. It is over here, is it not; and they end right here, do they not (indicating)? Do you see them?

Mr. Wilmer: I don't like to object, your Honor, but what in the world is the record going to look like?

Mr. Palmquist: I am going to put marks——

Mr. Wilmer: I have no notion of what he is putting marks on, anything about it. If he can show as he is proceeding what he is doing.

The Court: Perhaps counsel should come up here——

Mr. Palmquist: And look over my shoulder, yes. We will call these arrows "R-2's," to distin-

(Testimony of Gilbert Ripka.)

guish them from the other arrows. Now, those marks are a different type of marks, [249] these "R-2" marks than the "R-1" marks, is that correct?

Mr. Wilmer: Just a moment. If it please the Court, the exhibit is here, it is here for the jury's interpretation. What Mr. Ripka may interpret is completely immaterial. It is what the gentlemen determine it is. And to call upon him to interpret the picture is going beyond the realm of cross-examination and attempting to invade the province of the jury and interpret the picture for them.

The Court: The objection will be sustained.

Mr. Palmquist: All right, I will pass this picture to the jury at this time.

Q. (By Mr. Palmquist): Mr. Ripka, while the jury is looking at that picture I would like to ask you a question. Have you ever driven a two-wheel luggage trailer towed behind a car?

A. I have never driven one, I have rode in one.

Q. All right. You know something about how they tend to work, do you? A. Yes, sir.

Q. And assuming that a driver should suddenly frantically try to stop a car, braking, will they whip from side to side?

Mr. Wilmer: Just a moment. If it please the Court, I haven't objected to counsel attempting to carry out experiments here in the presence of the jury without it being shown the condition is the same, the type load is the same, the trailer hitch is the same, all the other conditions are the [250] same. What would happen under conditions of one

(Testimony of Gilbert Ripka.)

vehicle I think we all know would be different under conditions dissimilar and different vehicles.

Mr. Palmquist: I am not trying to carry out an experiment, just for illustrative purposes.

The Court: What kind of a luggage trailer, what kind of car, what kind of hitch?

Mr. Palmquist: The thing I wish to point out will apply to every two-wheel luggage trailer being towed behind a car without brakes.

Mr. Wilmer: If it please the Court—

The Court: You may ask him that question.

Q. (By Mr. Palmquist): All I wanted to ask you is this: If a trailer was whipping from side to side like this would it make marks that would come together such as we see in this picture?

Mr. Wilmer: I don't know how the witness can possibly answer the question. He said a trailer whipping from side to side. There is no description of how it is whipping.

The Court: If the witness can answer; if he doesn't know he can say so.

A. I don't believe I would know under the conditions.

Q. (By Mr. Palmquist): Mr. Ripka, let's assume, not that you did, but let's assume you had fallen asleep and failed to make the curve and such a driver in the position of Mr. [251] Sanders that night had been trying to stop when he saw you coming across that center line, while pulling to his right, and let's assume instead of the way you explained it with the trailer whipping behind and you

(Testimony of Gilbert Ripka.)

came across the center line and caught him like this, that would push this car sideways, would it not?

A. No, sir.

Mr. Wilmer: Just a moment. That is invading the province of the jury, if it please the Court. This man is not qualified as an expert in crashes, in the action of vehicles in an accident. Let these gentlemen decide what happened.

The Court: He may answer if he knows.

A. An automobile pulling to the right and broke, was braking at the same time, his action would be like this (indicating). It would not be like this. His action would be like this for the simple reason his leverage is behind his wheels. And in that manner it would have been caught more like this.

Q. All right. Now, Mr. Ripka, if he had come across like this when the collision occurred wouldn't you expect then to find the personal effects out of this trailer over here?

A. No, not necessarily.

Q. On the south of the center line?

A. No, sir. [252]

Q. You wouldn't have expected to have found them north and in the ditch, like a camera in the ditch and off the road, would you?

A. Yes, it could have been.

Q. With the tarp on the trailer having—a board off the trailer having impaled in the car and the tarp off that trailer coming in here like that? You would have expected to find most of that personal effects, if it happened south of the white line, you



(Testimony of Gilbert Ripka.)

would have found the contents of that trailer down in here instead of up in here, wouldn't you?

A. No, sir.

Q. You may be seated. Mr. Ripka, didn't you look at the skid marks out there on the pavement that night?

A. No, sir. I was slightly unconscious at the time and I don't recall too much after the accident.

Q. You remember talking to Sergeant Harris and his wife when they came along from the Navajo Ordnance Depot, that is the Army man and his wife who was the nurse?

A. No, sir, I don't recall talking to them. I don't recall too much that went on. I don't recall talking to them.

Q. Didn't you go out there during the daylight hours to see what marks were left on the road?

A. No, sir.

Q. You never went back at all?

A. I have never been back to the scene of the accident [253] except last Tuesday, the 3rd.

Q. How long were you in Flagstaff after the accident?

A. I believe until Friday evening, the following Friday evening.

Q. Is that a week?                      A. Be almost a week.

Q. And you never bothered to go back to look at any of the skid marks until last Tuesday?

A. I had no transportation.

Q. Who went with you last Tuesday?

A. Be—counsel.

(Testimony of Gilbert Ripka.)

Q. Mr. Wilmer here? A. Yes, sir.

Q. Up at Flagstaff? A. Yes, sir.

Q. And Mr. Wilmer wasn't in this accident that night, was he, he wasn't with you I mean.

Mr. Wilmer: May I have that question read?

(The last question was read.)

A. No, sir.

Q. (By Mr. Palmquist): All right, but he was with you last Tuesday? A. Yes, sir.

Q. What was the purpose of you and Mr. Wilmer going out there last Tuesday? [254]

A. We were returning from Flagstaff.

Q. What did you do in Flagstaff that week following the accident?

Mr. Wilmer: That is immaterial, if it please the Court, unless counsel has some impeachment foundation.

The Court: I don't see the materiality of it.

Q. (By Mr. Palmquist): You said you had no transportation. Flagstaff has taxicabs, do they not?

A. It would cost quite a bit of money for a taxicab.

Q. Well then, you can't say whether you ever saw any skid marks of any kind out there on the highway? A. No, sir.

Q. Let me ask you this. When you came up here and drew "R-3" you understood this map, you weren't confused as to the center line, were you?

A. No, sir.

Q. In fact, you and I discussed it and I made certain you understood this map, didn't I?

(Testimony of Gilbert Ripka.)

A. Yes, sir.

Q. When I told you to tell me where this accident happened there was some doubt in your mind even today as to which side of this center line this accident happened, isn't that correct?

A. No, there is no doubt in my mind.

Q. No doubt in your mind? [255]

A. No, sir.

Q. You still think you were down here five feet away from the center line?

A. Yes, sir.

Q. South of the center line?

A. South of the center line.

Q. And is it your contention that this violent accident this tragedy that happened that morning, can happen without leaving a mark south of the center line?

Mr. Wilmer: Just a moment. If it please the Court, that again is going way beyond the scope of cross-examination. What his contentions are are immaterial. What he saw, what he did we have no objection to it.

The Court: He has testified where it happened. That is his contention.

Q. (By Mr. Palmquist): Well, your contention includes almost as much area, to compare the two areas—well, about half as much—north of the center line of that highway as it does south of the center line, is that correct?

Mr. Wilmer: Now, I don't understand what counsel is referring to. I object to the question as not being intelligible.

(Testimony of Gilbert Ripka.)

Mr. Palmquist: I withdraw the question. I think it speaks for itself. He said that is where the accident happened. [256]

Q. (By Mr. Palmquist): Mr. Ripka, this is the truth, you are not certain where the accident happened and that is why you drew "R-3" as you did, isn't that correct?

A. I know it happened on the south side of the black line.

Q. But did you draw this line across this—this white line over to the north almost to the edge up here, right over where the car was found afterwards and made the various marks and so on, you drew this mark "R-3," didn't you?

A. Yes, sir.

Q. Mr. Ripka, so that you are not certain as to where the accident happened; it gets down to a question of what does the physical evidence show.

Mr. Wilmer: Just a moment. We object to that as being argumentative, if it please the Court.

Mr. Palmquist: I will withdraw the question. I have no further questions.

Mr. Wilmer: We have no questions at this time, your Honor.

The Court: Step down, Mr. Ripka.

NORMA JEAN SANDERS

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Palmquist: [257]

Q. You have been sworn I believe, have you not?

A. Yes.

Q. Would you tell us your full name?

A. Norma Jean Sanders.

Q. When were you born, Norma?

A. December 1st, 1935.

Q. You were seventeen at the time of this accident?

A. I was eighteen.

Q. Eighteen? A. Yes.

Q. Norma, your dad's full name was what?

A. Herbert Noah Sanders.

Q. He was a native of Missouri and so was your mother?

A. Yes.

Q. You were born where?

A. In Elijah, Missouri.

Q. How old was your father?

A. Forty-six.

Q. And what was the age of your mother?

A. She was thirty-nine.

Q. When you came out, your family came out to California, do you remember that?

A. Yes. It was back during the first of World War II.

Q. First of World War II? A. Yes. [258]

Q. That was in 1942, was it not? A. Yes.



(Testimony of Norma Jean Sanders.)

Q. Do you remember where you went first?

A. We were in Sacramento for about six months.

Q. What did your dad do in Sacramento?

A. He worked at a war factory or plant there.

Q. After six months at Sacramento where did you go?

A. We came to Oakland, California then.

Q. Before you came to California what kind of work had your dad done in Missouri?

A. He did construction work, road work, things like that.

Q. In Oakland what kind of work did he do?

A. During the war he worked in the shipyards, Moore Shipyards.

Q. Do you remember the name of the other shipyard he worked for?

A. I can't recall.

Q. Bethlehem?

A. Bethlehem.

Q. How long did he work at the shipyard?

A. Until 1948 or after the war anyway.

Q. In '48 do you remember where he went to work?

A. He went to work then at the Columbia Steel in Pittsburg.

Q. Do you know what he did at the shipyards and Columbia [259] Steel, what his rating was?

A. He was an outside machinist, a millwright.

Q. Millwright?

A. Yes.

Q. How long did he stay with Columbia Steel?

A. About three years, until 1951, I think it was.

Q. Then where did he go?

A. Then he went to work at Hunters Point.

(Testimony of Norma Jean Sanders.)

Q. That was the Federal Shipyard?

A. Yes, the naval shipyard.

Q. The Navy shipyard? A. Yes.

Q. How long was he at Hunters Point?

A. March, 1951, until October, 1953.

Q. Now, in October—by the way, what was your dad's rate of pay there when he left Hunter's Point?

A. He made about close to four hundred a month I think.

Q. Was he a civil service man?

A. Yes, he worked for civil service.

Q. In October, 1953, do you remember what happened?

A. Well, they had—you mean where he worked there?

Q. Yes, at Hunters, what happened to Hunters Shipyard?

A. They had a cutdown in their people, their work and things and he was laid off.

Q. What did your dad do after that? [260]

A. He went to night school, to Laney Trade and worked out of the union hall in Oakland.

Q. This Laney Trade, what is that school, who runs it? A. No, I don't.

Q. Do you know what he was studying there?

A. He was studying some kind of engineering.

Q. During the day he worked, you say?

A. Yes.

Q. Where did he work?

A. He worked out of the union hall there.

(Testimony of Norma Jean Sanders.)

Q. When you say out of the union hall, which union? A. This was the Machinists' Union.

Q. Machinists' Union? A. Yes.

Q. What did he do, get various jobs?

A. Yes.

Q. Do you know what the occasion was of you folks leaving Oakland and going over to New Mexico?

A. Well, yes, my father had heard about this job at White Sands, getting back into civil service, so we went out there to see about that.

Q. Did he want to get back onto civil service?

A. Yes, he did very much. He wanted to get back to get their benefits and retirement, things like that.

Q. Do you remember when you left [261] Oakland?

A. It was about June 12th I think, somewhere along there.

Q. Then where did you go?

A. Well, we went to White Sands, New Mexico.

Q. And did you stay at White Sands?

A. No, we stayed at a motel outside of Las Cruces.

Q. Las Cruces? A. Yes.

Q. What kind of place was this you stayed at?

A. It was an apartment and motel where they had housekeeping facilities.

Q. Did you folks have your own linen and so forth? A. Yes, we had our linen and dishes.

Q. How did you take those with you?

(Testimony of Norma Jean Sanders.)

A. On a trailer, we had a trailer.

Q. How many wheels was on that trailer?

A. It was a two-wheel trailer.

Q. With a tongue that hooked to the back of the car?

A. Yes.

Q. Do you remember what the sides of that trailer were?

A. It was like a pickup bed. It was made out of steel, then it was built up, had a wooden top to it.

Q. Wooden slats, were they?

A. Yes, sir.

Q. What was the color of those wooden slats?

A. I think they were just the natural wood color. I don't [262] think they had been painted.

Q. Did you folks own this trailer or was this one you had rented?

A. No, we owned it, we had bought it.

Q. Your dad had bought it?

A. Yes, sir.

Q. Was there a canvas or something that went over the top of it?

A. Yes.

Q. And when you stayed there at Las Cruces what did your father do?

A. He went out to White Sands to the Proving Grounds there and took the test and interviews for the job he was to get and he took a physical. And in the physical the doctors found that something——

Mr. Wilmer: Just a moment. If it please the Court, unless a proper foundation is laid, if she knows of her own knowledge what the situation is I have no objection, but if she is giving hearsay I object. There was no foundation laid for this testimony as of now.

(Testimony of Norma Jean Sanders.)

The Court: The witness couldn't conceivably testify to what the doctors found.

The Witness: This is what my father said, told his family.

Q. (By Mr. Palmquist): You mean what the family knowledge [263] was, is that right?

A. Yes.

Q. I would think she would be entitled to—was there a reason for the trip back to Oakland?

Mr. Wilmer: We withdraw our objection.

Q. (By Mr. Palmquist): All right. Will you tell us what the family knowledge was?

A. According to family knowledge, like I started to say, after my father had gone through these different tests and things and in the physical the doctor found something about his having these scars on his lungs and one of the doctors thought perhaps he had tuberculosis. And my father was kind of angry at it because he had been through it all before at different jobs he had. And he had pneumonia when he was quite young and that left scars on his lungs. He decided to go back to Oakland to get his civil service records from Hunters Point so he could more or less prove he didn't have it; he could have the job.

Q. Had you heard of the scars on your father's lungs before you had ever got to Las Cruces, New Mexico?

A. Oh, yes. It was common knowledge.

Q. How many times?



(Testimony of Norma Jean Sanders.)

A. Well, it was one of those things you know about of people I guess.

Q. Your papa had scars on his lungs, he grew up with that? [264] A. Yes.

Q. Did you know when or where or how he got these?

A. Why, yes, he had pneumonia when he was a boy and that left scars on his lungs. He had a very bad case of it.

Q. Had he had some arguments before, you say, on other jobs about these?

A. Yes. When he went to Hunters Point they found them then and it was proven of course it was the scar tissue.

Q. Scar tissue? A. Yes.

Q. Anyway, you then arranged to come back to get some records, is that it? A. Yes.

Q. To what, to send on to White Sands?

A. Yes.

Q. Now, that brings us to the actual trip. Do you remember what time you were packed up and left this cabin at Las Cruces and headed back to California?

A. We left I think around 3 o'clock Thursday morning.

Q. That would be the 9th of July?

A. Yes, it was the 9th of July.

Q. About 3 a.m. in the morning? A. Yes.

Q. And was there some reason why you started early in the morning? [265]

A. No, not really except for the heat, it would

(Testimony of Norma Jean Sanders.)

be easier traveling at night. We sort of arranged it that way.

Q. To avoid the heat? A. Yes.

Q. Where did your family stop that day, do you know? A. Albuquerque, New Mexico.

Q. Do you remember about what time it was when you stopped at Albuquerque?

A. I guess it was around 10 or 11 in the morning.

Q. Can you tell us how far it is from, if you know, from Las Cruces to Albuquerque?

A. I don't know the actual mileage.

Q. It took you from about 3 o'clock in the morning, about seven hours driving?

A. I suppose about that.

Q. Where did you stop at Albuquerque?

A. We stopped at a park they have there and we had a picnic lunch and my father rested until about 3 or 4 in the evening, then we went on.

Q. When you say your father rested, how did he rest?

A. We had blankets and pillows and things in the car, just laid down and went to sleep on them.

Q. Did he sleep? A. Yes.

Q. Do you know what time it was your family left [266] Albuquerque?

A. It was around 3:30 or 4 o'clock that evening.

Q. 3:30 or 4 that evening? A. Yes.

Q. Do you know how far it is from Albuquerque to where this accident happened?

A. No, I don't know the mileage there.

(Testimony of Norma Jean Sanders.)

Mr. Palmquist: If your Honor please, I would accept counsel's stipulation on that, if he knows.

Mr. Wilmer: That is one road I have never driven. I am sorry, I don't know.

Mr. Palmquist: I have a road map here. I figured it out, three hundred thirty-five miles. Perhaps you could check my figures.

Q. (By Mr. Palmquist): Anyway, it was late afternoon when you left Albuquerque?

A. Yes, sir.

Q. Did you stop some place for dinner, do you remember?

A. I can't remember where we stopped.

Q. But you did eat? A. Yes.

Q. Did you make various stops? Who all was in the car, by the way?

A. My father and mother and two younger sisters and myself. [267]

Q. Who was driving? A. My father.

Q. Did anyone else in the family drive besides your father? A. No, sir.

Q. Who was in the front seat with your father?

A. Myself and my younger sister.

Q. You were in the right front seat then?

A. Yes.

Q. Your younger sister was up there too?

A. Yes.

Q. Which younger sister, you have two.

A. The smallest one, Linda.

Q. Linda? A. Yes, sir.

Q. How old is Linda?

(Testimony of Norma Jean Sanders.)

A. She is eight now.

Q. Eight? A. Yes.

Q. She was seven then at the time of the accident? A. Yes.

Q. Where did your mother sit?

A. She was in the back seat on the driver's side, the left-hand side of the car.

Q. She was immediately then behind your father, is that correct? [268] A. Yes, sir.

Q. Then Wanda, I take it, was behind you?

A. Yes.

Q. And how old was Wanda?

A. She was thirteen at the time.

Q. Thirteen. Now, can you remember the last place your father stopped for coffee?

A. We stopped at the White Elephant Lodge.

Q. Where is that?

A. I don't remember exactly. That was around 12 o'clock that night.

Q. Did he have some coffee there?

A. Yes, we all had coffee.

Q. Did he do anything else there?

A. He bought some of these NoDoz pills.

Q. NoDoz pills? A. Yes, sir.

Q. Do you know what those are?

A. Sort of.

Q. Did he take any of those pills?

A. I don't know for sure if he did or not.

Q. You don't know. Then you started on, did you? A. Yes.

Q. Were you slumbering as you drove along?

(Testimony of Norma Jean Sanders.)

A. Yes, I was sleeping. [269]

Q. Was little Linda up between you and your dad sleeping? A. Yes, she was.

Q. Do you know whether Wanda was sleeping?

A. I don't know for sure. Like I said, I was sort of sleeping myself.

Q. After you left the White Elephant can you remember any other stop?

A. We stopped for gas outside of Flagstaff, I guess it was.

Q. At Flagstaff? A. Yes, sir.

Q. That was just before the accident happened?

A. Yes.

Q. Do you remember whether any of the children went to the bathroom there?

A. No, I don't remember. I was just about half asleep. I remember we stopped.

Q. Did you just stay in the car? A. Yes.

Q. And after he got gas at Flagstaff he drove on? A. Yes.

Q. Then you went back to sleep, did you?

A. Yes.

Q. What was the next thing you knew?

A. The next thing I remember was after the accident I guess. [270]

Q. I can't hear you.

A. I am sorry. I said the next thing I remember was after the accident happened.

Q. Were you still in the car?

A. No, I was thrown out of the car.

Q. You were thrown out of the car?



(Testimony of Norma Jean Sanders.)

A. Yes.

Q. You were seated next to the right-hand door then, is that correct? A. Yes.

Q. And when you were thrown out where did you land? A. I don't know really.

Q. Do you remember as to the center line on which side of the road you landed?

A. Well, no.

Q. Well, your dad was westbound on the right side of the highway, to you would be the north side.

A. I was off the road I think.

Q. Of the road, but were you south of the road or north of the road, that is what I am trying to find out.

A. I really couldn't say. I was too——

Q. Too shaken up? A. Too shaken up.

Q. I take it you were taken away from the scene of the accident, were you? [271] A. Yes.

Q. How did you leave the scene of the accident?

A. In a Greyhound bus.

Q. How long after the accident was that?

A. I really don't know.

Q. I want to ask you some things about your folks. Your mother's first name was what?

A. Delphia.

Q. You say Delphia was thirty-nine, your dad was forty-six? A. Yes.

Q. Did you father drink? A. No, sir.

Q. Did he smoke? A. Yes.

Q. What did he smoke when he smoked?

A. A pipe usually.

(Testimony of Norma Jean Sanders.)

Q. Was he a man that came home nights?

A. Yes.

Q. What time did he get home?

A. About 6:30 or 7.

Q. Right after work? A. Yes.

Q. Was he a man that would ever go to the grocery store to buy groceries?

A. Yes, he would usually get the groceries. [272]

Q. Did he entertain his family, did he take you places? A. Yes.

Q. And what kind of health was he in?

A. Good health, as far as I am concerned.

Q. Did you ever know of him ever having any tuberculosis as such, such as was suggested by this doctor? A. No, definitely not.

Q. Do you know as a matter of fact your father was in good health and did not have tuberculosis?

A. Yes.

Q. Was he a man that could put in a good day's work? A. He always did.

Q. Did you ever know of him staying at home from work because was sick? A. No.

Q. Do you know of him going to any doctors for any lung condition or any other condition for that matter? A. No.

Q. Was he a man that would devote his time to his family? A. Yes.

Q. How was he with money, was he a man that would save money or not?

(Testimony of Norma Jean Sanders.)

A. Well, if he had something he was saving for something, yes, and so on like that I guess.

Q. After this accident was over was there some money found [273] in your effects, the effects belonging to your folks? A. Yes.

Q. And where was that found?

A. Well, it was in a suitcase originally. I don't know exactly where it was found.

Q. Did you know how much money was in that suitcase originally? A. Approximately so.

Q. And was that money turned over to you girls? A. Yes.

Q. And how much money was that?

A. About \$2,400.

Q. \$2,400? A. Yes.

Q. That was in cash? A. Yes.

Q. Was your dad a man that liked to work?

A. He always enjoyed his work, from what he said.

Q. How did he get along with the family?

A. Very well.

Q. How did he get along with other people, people he worked with?

A. From what he said he got along well. He wasn't the type person who caused any trouble, anything like that.

Mr. Palmquist: You may cross-examine. [274]

(Testimony of Norma Jean Sanders.)

Cross-Examination

By Mr. Wilmer:

Q. Miss Sanders, do you have a clear recollection as to what time you left Las Cruces the morning of the 9th, was it 3 or was it 4 o'clock?

A. It was somewhere around there. I couldn't say for sure.

Q. Do you know how far your father proposed to drive after he left Flagstaff?

A. No, I don't really know, until morning.

Q. You did not discuss with him when you pulled away from Flagstaff or he didn't tell you how far he was going to drive on that night?

A. No.

Q. Was he in the habit of making trips like that of driving long hours?

A. Well, not really. We hadn't made that many trips for that matter.

Q. For instance, coming over from Oakland to Las Cruces did he drive as much as twenty-four hours at one time?

A. No, sir.

Q. Do you remember talking to the patrolman Bryfogle in the hospital or some place the day following the accident?

A. Vaguely.

Q. Do you remember talking to an officer?

A. I remember some officer came in right after we got to [275] the hospital.

Q. Do you remember discussing with him whether or not your father had actually been using

(Testimony of Norma Jean Sanders.)

the NoDoz tablets?      A. No, I don't.

Q. You had no discussion of that character with him?      A. I don't remember.

Q. The decision to leave Las Cruces and return to Oakland or to Hunters Point, was that a sudden decision or was that one your father made or left in accordance with the plans you previously made?

A. We were planning to come back to White Sands. You might say it was sudden.

Q. I mean by that you knew the day before you were going to return, did you not?      A. Yes.

Q. But you say you were going to Hunters Point to get these records and then return to Las Cruces?      A. Yes.

Mr. Wilmer: That is all.

Mr. Palmquist: No further questions.

Mr. Palmquist: Norma, you may stay in now.

Mr. Wilmer: I have not agreed to any witnesses staying in the courtroom.

Mr. Palmquist: I am sorry. [276]

### SANDRA MARTINEZ

called as a witness herein, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Palmquist:

Q. Mrs. Martinez, your first name is Sandra, is that correct?      A. Yes.

Q. Do you mind telling us your age?



(Testimony of Norma Jean Sanders.)

A. I am twenty-seven.

Q. Twenty-seven. And you are a married lady?

A. I am.

Q. And what is your husband's first name?

A. James.

Q. Your husband Jim, what is his occupation?

A. He is toll transmission man for the Pacific Telephone and Telegraph Company.

Q. How long has he been an engineer with the Telephone Company?      A. For eight years.

Q. You folks have been married for how long?

Mr. Wilmer: If it please the Court, I don't see where this matter is material. We are trying a case that involves, I am sure, the very pleasant lady and her husband, but I don't believe——

Mr. Palmquist: This will tie in with how she knew the [277] Sanders and so forth.

The Court: On that avowal you may proceed.

Q. (By Mr. Palmquist): How long have you folks been married?      A. Seven years.

Q. Now, did you folks at some time in your married life get to know Mr. and Mrs. Sanders?

A. Yes, we did.

Q. And what was the occasion of you folks getting acquainted?

A. We lived right across the porch from one another.

Q. That was there in Oakland?

A. Yes, it was.

Q. Did you know their children?

A. Yes, we did.

(Testimony of Norma Jean Sanders.)

Q. Did you get to know Mr. Sanders and Mrs. Sanders?      A. Yes, I knew them both.

Q. What year was that when you first got to know them?

A. That was in June of 1953.

Q. When did you first meet them?

A. Or 1952. Let me see—yes, 1952, June.

Q. Did you have a child that Mrs. Sanders would take care of?      A. Yes.

Q. How old was that child? [278]

A. Let me see, she was almost a year when we moved there. She was a year in October, 1952.

Q. Did Mrs. Sanders baby sit for you?

A. Yes. I was working during the day and she took care of my little girl.

Q. Where were you working?

A. I worked at Montgomery Ward's in Oakland.

Q. Did you pay Mrs. Sanders money to baby sit with your child while you worked?

A. Yes, I paid her weekly.

Q. Do you remember how much you paid her?

A. I paid her \$10 and on Tuesday evenings I took a class and paid her \$11 a week.

Q. \$11 a week to take care of your child?

A. Yes.

Q. Later I believe you moved from that area, did you?      A. Yes, we did.

Q. And you folks bought a home out in Concord, in the suburbs there?      A. Yes.

Q. Did the Sanders ever come out to see you?

A. Yes, they did.

(Testimony of Norma Jean Sanders.)

Q. You kept in touch with them after that?

A. Yes.

Q. Could you tell us something about Mr. Sanders as to his [279] character, habits and apparent health.

A. He was a very fine person. He was neighborly and very friendly. He worked during the daytime as did my husband and myself. We saw him in the evening. As to his health, he seemed to be in fine health. As I say, he worked all the time. He was awfully good with his children and awfully good with my little girl. He was usually at home about the same time we got home from work. He would often be playing with her and the other children.

Q. Was he a family man?

A. Definitely, yes.

Q. He liked his family?

A. He seemed to love them very much.

Q. Was he a working man?

A. Yes, he worked every day as long as I knew him.

Q. Did you ever know of him, any time you knew him ever having to be home sick for any reason?

A. No, I can't recall he ever missed a day as far as I knew. He was gone when we left for work every morning, when we took the child over to their home.

Q. By the way, do you know whether or not he ever drank as such?

(Testimony of Norma Jean Sanders.)

A. No, I don't believe he drank at all.

Q. Neither Mr. or Mrs. Sanders?

A. Not that I know of. [280]

Q. Do you know anything about their thrifty-ness or frugality as such?

A. I don't know any amount of money they were saving but I know they were budget conscious and that they did a lot of shopping for the girls and so forth at Montgomery Ward, for the girls, where I worked, which is where I buy a lot of my things.

Q. In other words, they watched their pennies?

A. Why, certainly.

Q. Could you tell us something about Mrs. Sanders, her character, habits, health?

A. She was a wonderfully loving person, very friendly, not mushy. And seemed to really love children and know how to handle them and get along with them. We appreciated so much her attention and love of our little girl when we couldn't be with her. She was always in good health. I worked a little over a year and I never had to stay home with my child because of her ill health. She seemed to manage her home very well. It was always neat and clean.

Q. She was a good homemaker, was she?

A. Very definitely. She was conscious of keeping the home clean. I know because my little girl was at a creeping age and she was concerned about the cleanliness of the floor and so forth.

Mr. Palmquist: You may cross-examine. [281]

Mr. Wilmer: No questions.

Mr. Palmquist: We now have some depositions, if your Honor please, testimony to offer by way of deposition. I do have a picture of the decedents—I seem to have mislaid it here, but I will find it overnight and offer that tomorrow. In the meantime we can read the depositions into evidence.

The Court: I think in view of the hour we can do that in the morning. At this time, Gentlemen, we will recess until 9:30 in the morning, that is thirty minutes earlier. I will ask you to be here at that time promptly, please. And during the overnight adjournment bear in mind the admonition.

(Whereupon a recess was taken at approximately 4:30 o'clock p.m. until the following morning, Saturday, August 6, 1955, at the hour of 9:30 o'clock a.m.)

The Court: You may proceed.

Mr. Palmquist: At this time, if your Honor please, we would like to offer the deposition of Howard Pease, taken in Oakland July 29th, and would like to read it into the record.

The Court: If it is going to be read in I don't know whether there will be objections or not—

Mr. Palmquist: Under the stipulation the objections were reserved.

The Court: Let's mark it for identification then and read it as marked for identification. That is Howard Pease? [282]

Mr. Palmquist: Yes, your Honor. I suggest Mr.



Scoville read the answers; I will ask the questions. If there are any objections counsel can make them at the appropriate time.

(Plaintiff's Exhibit 38 marked for identification.)

Mr. Scoville: Is that procedure agreeable with the Court?

The Court: Yes.

Mr. Palmquist: We will eliminate the preliminary pages to get down to the questions and answers, starting on page 4.

(Whereupon the deposition of Howard Pease, Plaintiff's Exhibit 38 for identification, was read to the Court and jury.)

Mr. Palmquist: The next deposition we wish to offer would be the deposition of Marilyn Tulley, taken at the same time, July 29, 1955, in Oakland.

(Plaintiff's Exhibit 39 marked for identification.)

(Whereupon the deposition of Marilyn Tulley, Plaintiff's Exhibit 39 for identification, was read to the Court and jury.)

Mr. Palmquist: The next deposition, if your Honor please, will be the deposition of Mildred M. Saunders.

(Plaintiff's Exhibit 40 marked for identification.)

(Whereupon the deposition of Mildred M. Saunders, Plaintiff's Exhibit 40 for identification, was read to the Court and jury.) [283]

Mr. Palmquist: The next deposition, if your Honor please, will be the deposition of Ellen Onstott.

(Plaintiff's Exhibit 41 marked for identification.)

(Whereupon the deposition of Ellen Onstott, Plaintiff's Exhibit 41 for identification, was read to the Court and jury.)

Mr. Palmquist: The next deposition and the last one is the deposition of James Martinez.

The Court: It will be marked Plaintiff's Exhibit 42 for identification.

(Plaintiff's Exhibit 42 marked for identification.)

(Whereupon the deposition of James Martinez, Plaintiff's Exhibit 42 for identification, was read to the Court and jury.)

(The following reference was made to a motion on page 13.)

Mr. Wilmer: We have no objection.

The Court: Let the record show that in the deposition of James Martinez, page 13, counsel for the defendant withdraws the motion to strike made at the taking of the deposition.

Gentlemen, we will recess at this time for about five minutes.

(Recess.)

WANDA SANDERS

called as a witness herein, having been first duly sworn, testified as follows: [284]

Direct Examination

By Mr. Palmquist:

Q. Please state your name?

A. Wanda Sanders.

Q. Wanda Sanders? A. Yes.

Q. How old are you now, Wanda?

A. Fourteen.

Q. At the time of the accident you were thirteen?

A. Yes.

Q. What was your father's name?

A. Herbert Noah Sanders.

Q. How old was your father at the time of the accident? A. Forty-six.

Q. Your Mother's name?

A. Delphia Flossie Sanders.

Q. What was your mother's age at the time of the accident? A. Thirty-nine.

Q. Wanda, where do you live now?

A. 2261 Herron Drive, Concord.

Q. Do you remember the accident?

A. No.

Q. Do you remember the trip leaving Oakland?

A. No.

(Testimony of Wanda Sanders.)

Q. You had a head injury in this accident?

A. Yes. [285]

Q. So you couldn't help us by telling us whether you were awake or asleep or not at the time of the accident?

A. No, I can't.

Q. You can't remember? A. I am sorry.

Q. You can't remember the trip now?

A. No.

Q. Do you remember any part of it?

A. No.

Q. Do you remember Albuquerque for example?

A. No. I have a hard time because we used to go back to Missouri and we stopped there often and I can't remember if we stopped on that trip or not.

Q. When you stopped in Albuquerque on the trip to Missouri that was the trip before this trip?

A. I think so.

Q. On your dad's vacation? A. Yes.

Q. Can you remember where you stopped at Albuquerque, the name of the place?

A. I remember this motel is called the Skyline Motel, because we stopped there quite often.

Q. What was the condition of your dad's health?

A. He was in good health.

Q. What kind of work did he do? [286]

A. Well, he was more or less a machinist.

Q. Did he work every day? A. Yes.

Q. Did you ever know of your dad being sick and off work for any length of time? A. No.

Q. What was your mother's health?

A. She had also good health.

(Testimony of Wanda Sanders.)

Q. Wanda, I asked you girls to find me a recent picture of your mother and father, as recent as you could. Did you make such a search?

A. It was pretty hard to find a recent picture of mother and dad, but I did find one.

Q. You did find one?           A. Yes.

(Plaintiff's Exhibit 43 marked for identification.)

Q. (By Mr. Palmquist): Wanda, when was this snapshot of your father and mother taken?

A. It was a year ago last Christmas.

Q. That would be the Christmas before the accident, about six months before the accident, right?

A. Yes.

Q. Is that a correct representation of your mother seated over here and your father there?

A. That is right. [287]

Mr. Palmquist: If your Honor please, we offer this in evidence at this time.

Mr. Wilmer: We have no objection.

The Court: It may be received.

(Plaintiff's Exhibit 43 marked in evidence.)

Q. (By Mr. Palmquist): Now, just to identify the picture, this is your father here?

A. That is right.

Q. And this is your mother here?

A. That is right.

Q. This is you here?           A. That is right.

Q. Got a bandaid; and this is your younger



(Testimony of Wanda Sanders.)

sister?           A. Yes.

Q. And this is one of your mother's babies she was sitting with?           A. Right.

Mr. Palmquist: I have no further questions.

Mr. Wilmer: No questions.

(Witness excused.)

Mr. Scoville: If your Honor please, at this time the plaintiff would like to offer in evidence the American experience from the mortality tables showing the expectation of life at various ages as the same appears from the tables in the Arizona Code of 1939. [288]

Mr. Wilmer: If it please the Court, we make no objection as to the authenticity of the tables or—what you want to call it—the necessary form of showing, but in the absence of a cautionary instruction on the limitation as to the purpose and the effect, we object to it.

Mr. Scoville: I think that such matters as counsel refers to is a matter to be covered by instruction. The mere offer is appropriate and should be in evidence.

The Court: There will be an instruction regarding mortality tables and how they are compiled and what they mean. In other words, their relations to average people.

Mr. Scoville: Yes. I presume that will be covered by the instruction, but I believe it is appropriate we put the mortality tables for the American experience in evidence.

Mr. Wilmer: With that understanding we have no objection.

The Court: I suppose by putting them into evidence you will read into the record the expectancy of a person age forty-six and a person age thirty-nine.

Mr. Scoville: That is all I presume to do.

The Court: Very well.

Mr. Scoville: The mortality table referred to and the statement just made by the Court reflect that for a person forty-six years of age the expectation of life, by the [289] American experience, is a period of 23.81 years. The tables further show that for a person thirty-nine years of age the expectation of life, according to the American experience, is 28.90 years.

The plaintiff rests.

Mr. Wilmer: We have a matter we would like to present to the Court.

The Court: Very well. Gentlemen, counsel have indicated they have a matter they desire to present to the Court. That can properly be done only in the absence of the jury. I will have to ask you at this time to please retire from the courtroom but don't go too far away because we will be calling you shortly. You may retire at this time. While outside bear in mind the admonition given you heretofore.

(Jury retires from the courtroom.)

Mr. Wilmer: If it please the Court, in the absence of the jury the defendants move the Court at the conclusion of all the evidence to direct the

jury to return a verdict in favor of the defendants and against the plaintiff; or in the alternative to dismiss the action, upon the following grounds:

First, on the ground there has been no proof with respect with the method or means by which the jury would determine the proper amount and measure of damages in the event a verdict was found for the plaintiff. In that, the [290] matter of determining the present worth of any given valuation is not a matter within the experience of a layman, but is a matter that lies entirely and solely within the realm of scientific and expert testimony. And there being no such evidence in the record there is nothing upon which the jury can properly deliberate and arrive at a verdict.

Secondly, upon the ground that the most the evidence of the plaintiff indicates is speculation and surmise as to the cause of the accident. The plaintiff has the burden of proving that the accident was caused by the negligence of the defendant. While of course we are not unaware of the rule that all inferences which may legitimately and properly be drawn and on a motion of this character, are drawn in favor of the plaintiff, nonetheless we say that the most the evidence supports is a speculation or surmise as to how the accident occurred and therefore is insufficient.

Thirdly, on the ground that the complaint alleges the action is brought by a general administrator of the estates of each of the two deceased persons. The proof offered in support of that is a certified copy of special letters of administration which are

in no fashion specified what the powers of the special administrator are. The statute provides that a special administrator may be appointed in the case of delay in appointment of an administrator or where from other circumstances it is necessary one be appointed. [291] And specifically provides that the powers of a special administrator shall be specified in the order of appointment. I do not think there can be any presumption that a special administrator has authority merely because he chooses to exercise it. I think we must bear in mind the fact that the procedure for the probate of estates and appointment of administrator is purely statutory. Therefore, there is no presumption of powers unless those powers be found in the statute. We urge that for this reason, if it please the Court, that we are in this predicament: If the Court did not have jurisdiction in making this appointment because it was not made on the basis of delay, and if in the order of appointment, which is not before your Honor, there was not authority granted specifically to bring this action, then we have a question of jurisdiction involved. And if the plaintiff who presumed to act in this case in fact was not properly appointed a special administrator, or, in fact, was not authorized to bring the action, we may be well at the hazard of trying a lawsuit and in the event the verdict of the jury is favorable, nonetheless be met by the fact the plaintiff in this case had no jurisdiction, a general administrator be appointed and again have the hazard of litigating the cause.



The Court: The last point you made, Mr. Wilmer, gave me some concern, but I find authority for an action of this [292] nature by a special administrator, and I think I can take care of it. Anyway, in the event there should be a verdict here against you I think I can protect everybody concerned by withholding the entry of any judgment until and unless a general administrator is appointed, qualified and is substituted for the special administrator.

Mr. Wilmer: Your Honor, may I say without arguing, I am not worried about that contingency. I am worried about the contingency that should there be a verdict in our favor how are you going to protect us then?

The Court: I think that the special administrator has the authority to bring the action. I mean I was concerned more about how, if a judgment were rendered, how you could be protected and assured. It is my understanding from the brief research I did that the special administrator here, the statute, wrongful death statute says a personal representative may bring it. That would include a special administrator. He brings it in the nature of a trustee for the next of kin. I was only concerned about the satisfaction of the judgment in the event there should be a judgment against you.

Mr. Scoville: I may say this action can be maintained by the next of kin or next friend by the express language that provides for it. This is necessarily *res adjudicata*, what happens here. [293]



The Court: I feel that way about it. I was concerned about it from the practical aspect.

Mr. Scoville: I think that is true, we would have to be fully qualified before we could receive it.

The Court: I think I could control that situation in the matter of judgment. Call the jury, please.

Mr. Wilmer: The motion is then denied, your Honor?

The Court: The motion is denied.

(Whereupon the jury return to the courtroom.)

### HAROLD F. EDWARDS

called as a witness herein, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Wilmer:

Q. State your name for the Court and jury.

A. Harold F. Edwards.

Q. What is your occupation or profession?

A. I am a doctor, M.D.

Q. Medical doctor? A. Yes, sir.

Q. What school did you graduate from, Doctor?

A. University of Colorado Medical School.

Q. When did you graduate? A. 1947.

Q. Following your graduation what type of practice did [294] you pursue?

A. Well, I took an internship of course and a short residency afterward. Immediately after that I went into general practice of medicine and surgery.

(Testimony of Harold F. Edwards.)

Q. Where did you go into general practice?

A. In Denver, Colorado.

Q. Where are you practicing at the present time?      A. Lander, Wyoming.

Q. How long have you practiced there?

A. I went to Lander in the spring of 1950, and I left there and went into the service the first of July of '53. And I was discharged from the service the 30th of June and went back to Lander.

Q. 30th of June of this year?

A. Yes, sir, that is right.

Q. Now, Doctor, during the time you were in the service I take it you were in the medical branch of the service?      A. That is right.

Q. Where were you stationed?

A. White Sands Proving Ground, New Mexico.

Q. That is near Las Cruces?

A. About twenty-five or thirty miles from Las Cruces, yes, sir.

Q. Did your duties include that of interviewing and making examination of applicants for employment? [295]      A. Yes, sir.

Q. I mean by that physical examination?

A. Yes, sir.

Q. Did you make a physical examination of a man by the name of Sanders?      A. Yes, sir.

Q. When did you make that examination?

A. I wouldn't remember except for the date on these X-rays, which was June 29, I believe.

Q. And these X-rays were taken by your request and direction, were they?

(Testimony of Harold F. Edwards.)

A. Yes. A chest X-ray was routine and with pre-employment physical examination.

Q. That was Mr. Herbert Noah Sanders?

A. I believe that name is correct, yes, sir.

Q. After you had received the first X-ray, Doctor, did you request a second X-ray?

A. I believe I did, at least subsequent X-rays were taken.

Q. And when were they taken?

A. The forepart of July.

Q. Do you have the X-rays with you?

A. Yes, sir, I do.

Q. Could you give us the exact dates from them?

A. That was June 29, that was the initial——

Q. Of 1954? [296]

A. Yes, sir. And the subsequent X-rays were taken the 2nd of July.

Q. After you had received the X-rays did you have a conversation with Mr. Sanders?

A. Yes, sir, that is right.

Q. Did you report to him the opinion you had come to with respect to his physical condition?

A. Yes, sir, I did.

Q. What did you tell him?

A. I just informed him that we had to reject him for employment and that he had some trouble in his chest, and it appeared to be tuberculosis; and that he should seek medical care and determine the exact cause of his X-ray findings and chest findings.

Q. Now, Doctor, when you made that statement

(Testimony of Harold F. Edwards.)

to Mr. Sanders what did he tell you, as best you can recall?

A. You mean when I told him of his condition?

Q. When you told him of his condition did he tell you anything with respect to having had pneumonia and having scars on his lungs?

A. Not that I recall, no, sir.

Q. What did he tell you?

A. I don't recall that he gave me any history relative to his chest.

Q. Did he tell you what he proposed to do with respect to [297] your recommendation?

A. Yes. He had some relatives I believe in California and he was going there, I believe—now, this is as I remember it—he was going there and was going to get medical care to determine the status of his chest condition.

Q. Did he state anything with respect to his financial ability?

A. Yes. He said he didn't have any money, I recall that, said he didn't have any money, didn't know what he was going to do.

Q. It was your conclusion from the examination of the X-rays and reports he did probably have active tuberculosis?

A. It seemed reasonable he did. I couldn't say on the basis of an X-ray he had active tuberculosis, but at least it was suggestive of that fact, yes, sir.

Mr. Wilmer: Cross-examine.

(Testimony of Harold F. Edwards.)

### Cross-Examination

By Mr. Palmquist:

Q. Your name is Harold Edwards, is that right?

A. That is right.

Q. Doctor, can I ask you how old you are?

A. I am forty-two.

Q. I noticed you didn't graduate from medical school until 1947.

A. That is right, sir. [298]

Q. Then you said you went into the service. That was because of your training, wasn't it, as a doctor?

A. I had some training under the Army A.S.T.P. program, that was the doctors' draft law, the reason I was called.

Q. And as a result of this doctors' draft law they sent you down to White Sands, is that correct?

A. Yes, sir, I was assigned there.

Q. Now, the government at White Sands in that project, like any employer, wants to make sure they get strong, healthy men for the money they pay out, isn't that correct?

A. Well, I don't know whether that is the purpose of the physical examination or not. People are hired with some physical disabilities where it is compatible with the job and so on. The main point that a doctor's responsibility is because of the compensation laws to later have a claim against the



(Testimony of Harold F. Edwards.)

government. That is the main reason for physical examination, as I see it.

Q. Doctor, while you were down there how many men do you think you examined, applicants?

A. For civil service. I just can't answer that exactly. We would rotate the duties of examining civil service employees. When we were officer of the day the doctor who was officer of the day would examine civil service applicants for that day.

Q. Doctor, I don't want to interrupt you. You understood [299] my question I am sure. My question was how many applicants had you examined while you were down there? I didn't want you to give me a talk about who did it, how or when. If you can't answer it say so, if you can give me some answer.

A. I can't give you a definite figure how many I examined. We would catch it about four, five or six days; when we did catch it we usually had about ten a day. That is a rough figure, that is not anywise correct I am sure, but it will give you some idea.

Q. Of these ten men would you remember them?

A. No, I wouldn't remember everyone, no, sir.

Q. Was there something about this man that made him stand out from all of the people you met at White Sands, New Mexico?

A. Yes, sir, there was.

Q. What was that?

A. His chest condition.

Q. His chest condition. You mean you didn't

(Testimony of Harold F. Edwards.)

find any other men with a chest condition down there?      A. I wouldn't say that, no.

Q. Or is it that you have had your memory refreshed when you learned you were to be a witness in this case?

A. Well, I remembered the case before my memory was refreshed.

Q. Well, Doctor, I suppose like all doctors you would take [300] a history from the people, questionnaires?

A. We usually got some history, yes, sir, relative to their employment.

Q. In fact, I imagine one of the questions you would be certain to ask was, "Have you ever had any tuberculosis."?

A. That probably would be right. I don't recall asking Mr. Sanders that but I imagine I did, I must have.

Q. And you must have written those answers down, didn't you?      A. Not necessarily.

Q. Have you got a piece of paper there?

A. I was just seeing this. I didn't know this was here. Let me look it over just a minute. Do you know where this came from?

Mr. Wilmer: No, I don't.

The Witness: It was in this X-ray envelope.

Mr. Wilmer: It came with the X-rays if it was in the envelope.

Q. (By Mr. Palmquist): Did you bring these or did Mr. Wilmer bring these to Court?

(Testimony of Harold F. Edwards.)

Mr. Wilmer: They were sent to me from White Sands, Mr. Palmquist.

Mr. Palmquist: You mean the Government is sending you records now?

Mr. Wilmer: I got them. [301]

The Witness: He did give me a history of having had pneumonia. That is on the record here.

Q. (By Mr. Palmquist): Doctor, may I ask you this question? A. Yes, sir.

Q. Do you think sometimes the faintest ink is better than the strongest memory?

A. Pardon?

Q. Do you think sometimes the faintest ink is more retentive than the strongest memory?

Mr. Wilmer: That is argumentative and speculative.

Mr. Palmquist: I withdraw the question.

Q. (By Mr. Palmquist): Doctor, may I see what you are looking at there?

A. Yes, if it is all right with the attorney.

Mr. Wilmer: Surely.

Q. (By Mr. Palmquist): You mean it has to be all right with him before I can look at this?

A. No, I can't say that. It isn't mine.

Q. Whose property is this, Doctor?

A. I can't answer that. Perhaps Mr. Wilmer can answer that. I don't know.

Q. You don't know these are the X-rays of Mr. Sanders then as far as that goes, do you?

A. I couldn't prove it, no, sir. That is a matter

(Testimony of Harold F. Edwards.)

of [302] record, however. There is a number on the X-ray.

Q. All right. Can I, Doctor, see these other papers you have there?      A. Yes, sir.

Mr. Palmquist: If the Court will pardon me just a moment while I look these over.

Q. (By Mr. Palmquist): Doctor, this form I have been looking at is the form that is furnished you by the United States Civil Service Commission, is that correct?

A. Yes, sir. The applicants would come over to the infirmary with such a form.

Q. You had not seen this form or didn't know it was in this envelope?      A. That is right.

Q. Until you got on the witness stand?

A. That is correct, sir.

Q. Let's see if there is anything else in here.

A. That is a good idea.

Q. Apparently we got it all. Now that you have seen this form, and you have seen this form before, haven't you?      A. I signed it, yes, sir.

Q. You recognize your signature on it?

A. Yes, sir.

Q. Do you have any knowledge how this sacred document got out of the files of the United States Civil Service Commission? [303]

A. I have no idea, no, sir.

Q. But you do recognize it as a genuine document, right?

A. Yes, sir, I don't think there is any doubt about that.

(Testimony of Harold F. Edwards.)

Q. And when you went through the examination of an applicant with this kind of a form you would ask him questions, wouldn't you?

A. Certainly.

Q. You would probably say to him, "Have you ever had any T.B.; have you ever been in any serious accidents; were you in the war, were you ever gassed," or "What childhood diseases," the things doctors ask people?

A. Yes, sir. The way it was usually worded, if they had any serious diseases or surgery or serious injuries of any type, that was usually the way that was asked.

Q. Then you would say what the facts were of what you wrote in July of last year would probably be more authentic than what you said, even if under oath, in July of '55?

A. What I have written here is a matter of record; I would say that would be authentic. However, everything isn't written on those forms certainly.

Q. Well, what have you been doing the last year?

A. What have I been doing?

Q. Since the time you signed this in July of last year?

A. Well, I was an officer in the Army until June of this year, June 30th of this year, at which time I was discharged. [304]

Q. You have been out a month now?

A. Roughly a month.

Q. Glad to be out?

A. That is right, yes, sir.



(Testimony of Harold F. Edwards.)

Q. I imagine there were any number of things that occupied you besides this one little man from California that was trying to get a job?

A. Certainly.

Q. You probably never thought of him again, did you?

A. Well, his initial X-ray, I had sent it down to William Beaumont Army Hospital to get a reading by a radiologist down there. Those are the two little slips you have there. While waiting for the reading to come back he was in almost every day. I saw him, oh, two or three times there, I can't just remember the dates, but subsequent to my initial examination he was back making inquiries. He was very eager to go to work of course.

Q. Doctor, you failed to answer my question. Would you read the question?

(The last question was read.)

A. I did think of him again, both when he came back and I heard later through Dr. Strand that he had been killed in an accident.

Q. Been killed in an accident?

A. I heard that from Dr. Strand. That was by way of [305] conversation.

Q. Who was Dr. Strand?

A. He was the post surgeon there.

Q. Apparently he impressed Dr. Strand enough so that Dr. Strand remembered his name?

A. Apparently so, yes, sir.

Q. Something made him stand out?

(Testimony of Harold F. Edwards.)

A. Yes, sir.

Q. You think that something was he would make a trip to California and was going to come back to New Mexico with some other United States Civil Service Commission records?

A. I think it was his chest condition that made him or caused him to be remembered by the doctors there. It was Dr. Strand's duty as post surgeon to do the final rejecting. In other words, I could reject a man and he could reverse the decision if he wished. He was post surgeon, I wasn't. I wasn't at that time, certainly.

Q. Let me ask you this, how much experience have you had with tuberculosis?

A. I can't answer that, sir. Certainly in medical school and in practice anytime you see a chest X-ray you have to think of it if there is anything suggesting it. To tell you how much experience I have had in tuberculosis, I am unable to answer that.

Q. You know the history of T.B.? [306]

A. Somewhat.

Q. It has gone under various names, has it not?

A. Tuberculosis?

Q. Yes.

A. It is mistaken diagnosis in many cases, yes.

Q. It is a mistaken diagnosis in many cases, is that what you just said?

A. You asked me if it went under different names. True, tuberculosis, as far as I know, has never been under any other name, but what I

(Testimony of Harold F. Edwards.)

thought you meant, sir, was when you said it was under different names, a person may have a chest condition and he may call it other than tuberculosis. That is the way I meant my answer to be. I didn't mean to be misleading there at all.

Q. Doctor, originally they called it consumption, is that correct?

A. It has been known as that, yes, sir.

Q. A consumptive cough? There was at one time a great deal of ignorance about tuberculosis, even amongst medical men, is that correct?

A. That is true of everything in medicine.

Q. Have there been new discoveries about tuberculosis even within the last fifteen years?

A. What do you mean by new discoveries?

Q. In relation to the new antibiotics, penicillin and [307] drugs?

A. Treatment has changed in the last fifteen years, yes, sir.

Q. Would you agree with the statement made by a medical man that tuberculosis is no longer the mystery, no longer a medical problem?

A. I would not agree that it is no longer a medical problem because people are still dying with tuberculosis certainly.

Q. People die from various causes every day despite doctors, isn't that right?

A. Yes, sir. But it is for that fact it is still a medical problem.

Q. Yes. Well, right in this city I understand there is a great T.B. clinic?

(Testimony of Harold F. Edwards.)

A. I have been told that. I am not acquainted around here however.

Q. So there should be some men around here that should know something about tuberculosis?

A. I imagine there are, certainly.

Q. Now, Doctor, did you ever have pneumonia at any time in your life?

A. Have I personally had pneumonia? Yes, sir.

Q. Did it leave scar tissues on your lungs?

A. That is a difficult question for me to answer. I have [308] a low grade bronchiectasis in my chest.

Q. What is that?

A. It is a chest condition. To say that that came from pneumonia, I can't say that it has or hasn't or whether it was congenital in origin.

Q. Could that be the brand of cigarettes you smoke?      A. No, I don't think so.

Q. This bronchiactesis, you mean by that the medical name for it is rales, could that be a name?

A. No, bronchiactesis is a condition. Rales is what you hear with your stethoscope.

Q. Could you hear a——

A. Bronchiectasis?

Q. With a stethoscope?

A. Sometimes you may if there is some congestion in there, certainly.

Q. I could be described as rales of those lungs?

A. It could be, yes, sir.

Q. Would you check here——

(Testimony of Harold F. Edwards.)

A. I read that. I think it says, "Rales in both chests."

Q. In other words, if I were a medical doctor and had my stethoscope I could write down the same thing about you that you wrote about Mr. Sanders, that is, you have rales in both lungs?

A. Only if I have a little cold and so on, little [309] congestion, then you might hear rales in both chests. That is true of anyone else.

Q. That wouldn't mean you had tuberculosis, would it, Doctor?

A. No, it wouldn't. Rales in both chests means there were findings in both chests and then the X-ray of course gives you further insight. Those are just findings. It is no attempt at diagnosis. Those are just physical findings.

Q. Now, Doctor, you tested this man's heart and blood vessels, didn't you?

A. I went over him quite thoroughly.

Q. And he had a very good blood pressure, didn't he, it was 120, is that, 120/80 or changed to 74?

A. 74 is the lower figure. That top, it is probably 100/74.

Q. Someone had written 120.

A. Yes. The corpsmen do the blood pressures and take the visual readings and so on.

Q. One of the nemeses of senility or old age or as we all wear out is high blood pressure, isn't it, something we have to fear, isn't it?

A. Some people have to fear it. Not all old people have high blood pressure.



(Testimony of Harold F. Edwards.)

Q. This man didn't have high blood pressure, very normal blood pressure?

A. No, certainly it isn't high. [310]

Q. And you found he was very normal for his age as to his heart and blood vessels?

A. Heart and blood vessels very normal for his age.

Q. If a man had been fighting tuberculosis that could affect his blood pressure, wouldn't it?

A. Well, that is kind of hard to say. A man with tuberculosis wouldn't necessarily need to have high blood pressure or low blood pressure. On the other hand, if he was very apprehensive about it, worried a great deal and so on, from an emotional standpoint his blood pressure might come up.

Q. You are not suggesting tuberculosis is a psychiatric thing now?

A. No. You asked me if tuberculosis would raise a person's blood pressure. If he were extremely apprehensive about his condition it may raise his blood pressure. The disease itself, as far as I know, would not cause any elevation in blood pressure.

Q. I thought you told me you told this man he had T.B.?

A. I did not tell him he had tuberculosis. I told him he had some physical findings and his chest X-ray was suggestive of tuberculosis. I advised him to seek medical care to determine if he did have tuberculosis and see if it was active. It was not my duty to make a diagnosis in his case.

(Testimony of Harold F. Edwards.)

Q. Doctor, will you tell us what his pulse rate was, for example, refreshing your memory. [311]

A. It is written down here, 80; and after exercise—I don't know what that is, 95 or 98 there.

Q. Is that within normal limitation?

A. That is right. And two minutes after exercise it was back to 80.

Q. That indicated, Doctor, a man in pretty good health, didn't it, that as a clinical finding in and of itself?

A. Well, that fact would be normal enough. That wouldn't give a total picture of him, certainly.

Q. Do you know what active tuberculosis does to a man's heart condition?

A. In some instances I do.

Q. Is it a stress and strain on the heart?

A. Tuberculosis—now, this is just generally speaking—any condition that will cause a fibrosis of the lungs, and tuberculosis is one of those conditions, will put a strain upon the right side of the heart because it is, just from the mechanical angle, more difficult to get the blood through the lungs for aeration. So in that respect tuberculosis could put a strain on the heart. Now, it doesn't do that in every case.

Q. Doctor, you brought some X-rays here. Do you claim to be a technical man that can look at these X-rays and read them and tell us this man has some tuberculosis?

A. His initial X-ray there was only suggestive of [312] tuberculosis.

(Testimony of Harold F. Edwards.)

Q. You are not answering my question. I am talking about you, Doctor.

A. Will you repeat your question?

Q. You are the only one I can cross-examine, and I want to know. I will repeat my question. I can't cross-examine anyone that isn't here.

Mr. Wilmer: He asked you to repeat the question, Mr. Palmquist.

Q. (By Mr. Palmquist): My question was: Can you, Doctor, take these X-rays and qualify here as a roentgenologist, experienced from a clinical standpoint, and from your technical standpoint and definitely point out to me on any of these X-rays a definite diagnosis of T.B.?

A. I did not make a definite diagnosis of tuberculosis. There were some findings there that were suggestive of tuberculosis.

Q. Doctor, will you answer my question. Can you qualify right here and now——

A. Can I look at those X-rays and say that is tuberculosis?

Q. I am asking you if you can qualify as a roentgenologist?

A. I am not a roentgenologist, no, sir.

Q. Capable of diagnosing from these X-rays——

The Court: He has answered your question.

Q. (By Mr. Palmquist): You cannot do it? [313]

Mr. Wilmer: He did not say that. He says he is not a roentgenologist. It does not mean the doctor can't look at X-rays and read them.

(Testimony of Harold F. Edwards.)

Q. (By Mr. Palmquist): Can you qualify as an expert that can definitely diagnose tuberculosis from these X-rays?

A. No, I can't diagnosis tuberculosis from those X-rays. I can say they are suggestive of tuberculosis, but I can't make a definite diagnosis.

Q. Counsel for the defense asked you a question here. He said, "Did this man ever tell you he had pneumonia? Did he ever tell you he had scar tissue?" And your answer was no, wasn't it?

A. That was before I saw that, part of my record there was he apparently told me he had pneumonia because I have a note here he had an old pneumonia.

Q. You would have never known he had this old pneumonia unless he told you?

A. Certainly, I asked him.

Q. Herbert Noah Sanders is the only man that could have told you that, isn't he?

A. Apparently so. He apparently did give me a history of old pneumonia there.

Q. What is pneumonia, Doctor?

A. It is a disease of the lungs.

Q. Is it one of those things you either die from or get [314] well from?

A. I guess you could say that.

Q. Sometimes when you get well from it it leaves some evidence and pretty definite evidence that it has been there?

A. Pneumonia doesn't always leave scars, it can.

Q. Can a bad case of pneumonia leave scars?

(Testimony of Harold F. Edwards.)

A. Yes. Pneumonia sometimes leaves scars, not always.

Q. Now, I notice as far as X-rays were concerned you said you sent him to X-ray men at the Base?

A. I sent his X-rays down to the radiologist, and the radiologist in turn requested further X-rays there, which are also there and you have the reading of Colonel Kellogg there who is the radiologist.

Mr. Palmquist: Thank you, Doctor.

Mr. Wilmer: We have no further questions.

(Witness excused.)

Mr. Palmquist: Could I ask the doctor one question?

Mr. Wilmer: Surely.

Q. (By Mr. Palmquist): There has been some question raised about No-Doz tablets, Your Honor. I will call him as my witness for that purpose if I can.

The Court: Go ahead.

Q. (By Mr. Palmquist): Are you familiar with No-Doz tablets?

A. Only in a cursory sort of way.

Q. They are a caffeine base, are they not? [315]

A. As I remember they are, yes, sir.

Q. A No-Doz tablet, Doctor, they are sold and say, "Keep alert safely, No-Doz awakeners," is that correct?

Mr. Wilmer: If it please the Court, counsel is going outside——



(Testimony of Harold F. Edwards.)

The Court: Objection sustained.

Q. (By Mr. Palmquist): Doctor, are there drug laws that govern the sale of matters of that kind to the public?

A. No-Doz is of course proprietary drug and apparently meets with laws governing it, otherwise they certainly wouldn't sell it over the counter as they do. I have never prescribed it.

Q. Doctor, as a matter of fact, I could empty this box right now and take all of these and come back here this afternoon and be alive and try this case, isn't that right? You want to make a bet on that?

A. I don't know whether you could or not. I couldn't answer that question.

The Court: That is all, Doctor. We will recess until 1:30.

(Whereupon, a recess was taken at 12 o'clock noon until 1:30 o'clock p.m.)

### HAZEL CAMMACK

called as a witness herein, having been first duly sworn, [316] testified as follows:

#### Direct Examination

By Mr. Wilmer:

Q. Would you give us your full name for the Court and jury?

A. My name is Hazel Cammack.

Q. Where do you live?

(Testimony of Hazel Cammack.)

A. At Fairacres, New Mexico.

Q. Where is that in relation to the City of Las Cruces?

A. Four miles west.

Q. And what is your occupation there?

A. I manage the Picacho Court.

Q. That is what type of business?

A. They have apartments and overnight rentals.

Q. Did you manage that in 1954, in July of 1954?

A. Yes.

Q. Did you become acquainted, Mrs. Cammack, with a family by the name of Sanders, Herbert Noah Sanders and Delphia Sanders?

A. Yes.

Q. Were they tenants in the court?

A. Yes.

Q. How long did they remain there, Mrs. Cammack?

A. From June 28th to July 9th.

Q. During the time that they were tenants in the court, what type of a living accommodation did they have rented? [317]

A. They had two double beds in an apartment.

Q. Who stayed in the apartment?

A. The girls and mother.

Q. Where did Mr. Sanders sleep?

A. In his car.

Q. Did you offer to put a bed in the apartment for him to sleep in the apartment?

A. Yes, sir.

Q. What did he say?

A. He said he preferred his car.

Mr. Wilmer: That is all.

Mr. Palmquist: No questions.

Mr. Wilmer: May Mrs. Cammack be excused?

Mr. Palmquist: No objection.

(Witness excused.)

### CHARLES CAMMACK

called as a witness herein, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Wilmer:

Q. Will you tell us your name, please?

A. Charles Cammack.

Q. Your mother was the lady who just left the courtroom?      A. Yes, sir.

Q. Where do you live, Charles? [318]

A. Las Cruces.

Q. What do you do there? You live with your parents, do you?      A. Yes.

Q. What do your parents do?

A. They run a tourist court.

Q. And how far out of Las Cruces?

A. Two or three miles.

Q. In the summer of 1954 do you remember a man by the name of Mr. Sanders staying there?

A. Yes, sir.

Q. Did you get acquainted with him?

A. Yes, sir.

Q. How did you get acquainted with him, Charles?      A. Just talking with him.

Q. Do you do any work around there or did you at that time do any work around the court?

(Testimony of Charles Cammack.)

A. Yes, sir, I was watching the service station.

Q. There is a service station?

A. There was one.

Q. At that time? A. Yes, sir.

Q. And you looked after it? A. Yes, sir.

Q. How did you happen to talk to Mr. Sanders? [319]

A. I don't know. He was just sitting out there with me and talking.

Q. Did he ever talk with you about what his habit was when he was taking a trip and how long he would drive? A. Well, he said——

Mr. Scoville: Just a moment. What was the question? May we have it read.

(The last question was read.)

Mr. Scoville: No objection to an answer of yes or no to that question.

Q. (By Mr. Wilmer): Did he ever tell you, Charles, what kind of hours he drove when he was on a trip? A. Yes, sir.

Q. What did he tell you?

Mr. Scoville: Objection, if Your Honor please, on the ground it falls within no exception of the hearsay rule that I know of as to habit or custom. I believe under the dead man's statute, so to speak, where death has sealed the lips of one of the parties then under the circumstances such statements are not admissible, such evidence is not admissible. We object to it on those grounds.

The Court: I don't think the dead man statute would be applicable to it.

(Testimony of Charles Cammack.)

Mr. Scoville: I have the further objection on the ground it is irrelevant, incompetent and immaterial. [320]

The Court: On that ground it will be sustained.

Mr. Wilmer: We would then like to make an offer of proof, if it please the Court, as to what the witness would testify to.

The Court: Very well. I will give you an opportunity to make it before we close the record.

Mr. Wilmer: Very well. With that we will excuse the witness.

Mr. Scoville: No questions.

### LILY MUTCH

called as a witness herein, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Wilmer:

Q. Will you tell the Court and jury your name, please, Madam?

A. My name is Mrs. Lily Mutch.

Q. Mrs. Lily Mutch? A. Yes.

Q. Will you tell us where you live?

A. Fairacres, New Mexico.

Q. That is outside of Las Cruces about four miles? A. Yes, sir.

Q. What is your business there?

A. I have a grocery store there. [321]

Q. Did you have a grocery store there in July of 1954? A. Yes, sir.



(Testimony of Lily Mutch.)

Q. Do you remember a man by the name of Sanders, Mr. Noah Sanders coming to your store?

A. Yes, sir.

Q. What was the purpose of his visit?

A. The purpose of his visit was to ask if I could give him credit a few days, until the found a post at White Sands Proving Ground, that he thought he might get the post.

Q. Did he tell you whether or not he had any money?

A. He told me he didn't have any money, but if he didn't get the job he would cash some bonds he had and pay me for the credit he got while trading with me.

Q. Did you give him credit?            A. I did, sir.

Q. Did he use that credit to run up a bill?

A. Yes, sir.

Q. How much was the bill?

A. \$16.84, if I remember right.

Q. Did you know Mr. Sanders was going to leave Fairacres and leave the state?

A. No, sir.

Q. Did he pay you his bill before he left?

A. No, sir.

Q. Has it ever been paid to this day? [322]

A. No, sir.

Mr. Wilmer: That is all.

(Testimony of Lily Mutch.)

Cross-Examination

By Mr. Scoville:

Q. You know he was killed a very few days later in an automobile accident?

A. Yes, sir.

Mr. Scoville: That is all.

Redirect Examination

By Mr. Wilmer:

Q. Did you know he had \$2,400 with him when he asked you for credit?      A. No, sir.

Mr. Wilmer: That is all.

Recross-Examination

By Mr. Scoville:

Q. Did you know it was his intention to return to New Mexico?      A. To New Mexico?

Q. Yes.      A. No, sir.

Q. Did you send a bill to his children?

A. No, sir, I didn't know where they were.

Mr. Scoville: That is all.

Mr. Wilmer: That is all. May Mrs. Mutch be excused? [323]

The Court: You may be excused.

(Witness excused.)

YOUNG VEAZEY

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. You have told us your name is Young Veazey, Senior, is that correct? A. Yes, sir.

Q. You live in Flagstaff? A. Yes, sir.

Q. What is your occupation there?

A. Well, I am a used car dealer and junk dealer.

Q. Do you have a wrecker?

A. Yes, sir, tow car business.

Q. In July, 1954, Mr. Veazey, what were you doing? A. I was with Caffey Auto Salvage.

Q. In Flag? A. Flag, yes, sir.

Q. On the morning of July 10th about 3 or thereabouts, did you have occasion to go with your wrecker to the scene of an accident about seven and one-half miles west of Flag on Highway 66?

A. Yes, sir. [324]

Q. You drove the wrecker? A. Yes, sir.

Q. When you got there, Mr. Veazey, did you observe a Hudson automobile which had been wrecked on the highway? A. Yes, sir.

Q. Do you remember where it was on the highway, did you make any specific measurements or anything like that at the time?

A. No, I didn't make any measurements any more than it was more or less on the north side.

Q. Did you observe the condition of the highway?

(Testimony of Young Veazey.)

A. I used the crane and lifted the front up, yes, and pulled it off the road.

Q. And it drug on the road as you drug it down the road. How far did you take it down the road? [327]

A. I would say as far as from here to the door over there.

Q. Didn't it drag on the road at that time?

A. They don't drag when you get them picked and on the front wheels.

Q. Didn't you attach a cable to it while the deceased was still in it and pull on it? A. Yes.

Q. Wouldn't that have affected the underneath of the car as it was flat on the road?

A. The car did not move when I taken the deceased out of it.

Q. You are not in the position to say the underside of the car was not changed, are you, between the time you first saw it and the time you got it to the garage and later lifted it up?

A. I am in a position to say we couldn't find no marks of any kind under the car.

Q. I am saying you don't know whether it was changed or not—there were no marks of any kind, is that your testimony?

A. No marks during the time.

Mr. Scoville: I have no further questions.

Mr. Wilmer: I think he has finished his cross-examination.

Mr. Scoville: You didn't object.

Mr. Wilmer: I didn't get a chance to. [328]

(Testimony of Young Veazey.)

Mr. Wilmer: Mr. Veazey, what I am getting at is, on the underside of that Hudson could you find where any metal, sharp metal of any kind had been brightened or had any foreign material like road material on it which would indicate it had gouged into or been in contact with the surface of the highway? A. No.

Mr. Wilmer: Cross-examine.

Cross-Examination

By Mr. Scoville:

Q. Mr. Veazey, I understood your testimony to say that the car was in the—in other words, nothing particularly happened to it between the time you picked it up and the time you got it over to the garage? A. Yes, sir.

Q. You know, Mr. Fronske, the photographer in Flagstaff? A. Yes, sir.

Q. Do you remember two or three days after this accident, the 12th or 13th, something like that, Mr. Fronske came over and took some pictures, do you happen to remember the occasion?

A. Yes, sir.

(Plaintiff's Exhibit 44 marked for identification.)

Q. I show you what has been marked Plaintiff's Exhibit 44 for identification. You recognize that as the Hudson, a picture of it taken at the garage there, isn't that right? [329] A. Yes, sir.

Q. And that is the way it looked, is it not? That



(Testimony of Young Veazey.)

is a fair and accurate reproduction of that vehicle, isn't that right, sir?           A. Yes, sir.

Mr. Scoville: We offer Plaintiff's Exhibit 44 in evidence.

Mr. Wilmer: No objection.

The Court: It may be received.

(Plaintiff's Exhibit 44 marked in evidence.)

Q. (By Mr. Scoville): Referring to Plaintiff's Exhibit 44 in evidence, Mr. Veazey—I wonder would you mind stepping down just a step, Mr. Veazey. You might look at this. So the jurors can see it will you sort of stand this way. It is true, is it not, that the right front—rather the left front wheel, the rim shows that it has been bent and the tire has been knocked in such a position that that rim shows some evidences of being scraped, do you recall that? The rim scraped, where it had scraped on the pavement?

Mr. Wilmer: If he is asking the witness to interpret the picture——

Mr. Scoville: I am asking him if recalls that and using the picture to refresh his recollection as to the place I am pointing at.

Mr. Wilmer: Just a moment. I object to counsel [330] holding it up and asking the witness to interpret it. I have no objection to passing it to the jury and having them decide themselves what the picture shows.

Mr. Scoville: My point is, Your Honor, it is only a photograph after all.

The Court: May I have the question, please?

(Testimony of Young Veazey.)

Mr. Wilmer: I will withdraw the objection. Go ahead.

Q. (By Mr. Scoville): Do you recall this rim being bent and the tire being torn away from it?

A. I suppose so.

Q. Do you remember it, that is all?

A. Yes.

Q. I will show you a series of three——

The Court: May I see those?

Mr. Scoville: I don't believe they are in evidence.

The Court: No, but you had the same thing marked before.

Mr. Scoville: I am sorry. I recall they were identified but I couldn't get them in before.

Mr. Palmquist: By Mr. Fronske.

Mr. Scoville: May I withdraw those? What would be the most convenient way?

The Court: I think it would be easier, we already have so many pictures, if you would use the earlier ones.

Mr. Wilmer: If counsel would let me see them I probably [331] can stipulate to them.

The Court: I think they are 5, 6, 7 and 8, are they not?

Mr. Wilmer: We have no objection.

The Court: They may be received.

Mr. Scoville: They are Plaintiff's 5, 6, 7 and 8.

Mr. Palmquist: May we withdraw the others?

Mr. Wilmer: We have no objection.

(Testimony of Young Veazey.)

The Court: 45, 46, 47 and 48 for identification may be withdrawn.

Mr. Scoville: I will pass those to the jurors and have no questions about those.

Q. (By Mr. Scoville): Mr. Veazey, I believe I have only one other question. You made some examination of the personal contents of the Hudson automobile, some search of it, did you not?

A. Yes, sir.

A. And I believe you are the man who found \$2,400 in the suitcase in two wallets, is that correct?

A. Yes, sir.

Q. I believe you turned that money over to the authorities, is that correct?

A. Yes, sir.

Mr. Scoville: No further questions.

Mr. Wilmer: That is all. May Mr. Veazey be excused? [332]

Mr. Scoville: No objection.

The Court: You may be excused, Mr. Veazey.

(Witness excused.)

### ROY H. BRYFOGLE

called as a witness herein, having been first duly sworn, testified as follows:

#### Direct Examination

By Mr. Wilmer:

Q. State your name?

A. Roy H. Bryfogle.

Q. What is your occupation?

(Testimony of Roy H. Bryfogle.)

A. Arizona Highway Patrolman.

Q. Where are you stationed?

A. Flagstaff.

Q. How long have you been there?

A. Going on four years.

Q. How long have you been a member of the Patrol?      A. Four years, going on it.

Q. Have you had any experience as a police officer prior to that?

A. I have been a police officer about fifteen years all told.

Q. Roy, on the 10th of July last year did you have occasion to be called to the scene of a collision about seven and a half miles west of Flagstaff? [333]      A. Yes, sir.

Q. Do you recall approximately when you received the call?

A. Around 3 a.m. in the morning.

Q. Where were you?      A. I was home in bed.

Q. You went immediately, did you?

A. Yes, sir.

Q. Do you recall when you arrived?

A. Within ten minutes after receiving the telephone message.

Q. When you got there, Roy, what did you find?

A. I found a west bound passenger car and east bound semi had collided.

Q. Did you note the position of the two vehicles which had been in the collision at the time?

A. Yes, sir.

Q. What was the vehicle to the east?

(Testimony of Roy H. Bryfogle.)

A. The vehicle to the east was the semi. It was off on the north side of the road, had gone completely off the road in a northeasterly direction.

Q. And the other vehicle was where?

A. It was on the highway at an angle facing in a southwesterly direction.

Q. Now, where the Hudson, I believe it was, came to rest, was that in the vicinity of a macadam or asphalt patch in the [334] pavement?

A. Yes, sir.

Q. Do you recall approximately the area of that patch, that is, was it clear across the cement portion and how far east and west did it extend?

A. I would estimate it about thirty feet wide. It had completely covered the cement. The cement had cracked there and they had covered it with macadam. The cement was over the culvert.

Q. Did you find any foreign substances on the roadway when you arrived there, Roy?

A. What do you mean?

Q. I mean by that, oil grease, gasoline, anything of that nature?

A. I found a tremendous amount of Diesel oil, gasoline and other debris at the scene.

Q. Approximately from what point on the highway to what point did the Diesel oil, gasoline and other debris extend?

A. Oh, it covered about the entire area of the macadam. The road slopes a slight bit to the south so the oil and gasoline would run from where the



(Testimony of Roy H. Bryfogle.)

Hudson had been, or from the west bound lane, it would run across the east bound lane of traffic and over the shoulder.

Q. Were there any officers there by the time you arrived?

A. No, sir, I was the first one there I [335] believe.

Q. I presume your first care and consideration was for the occupants of the vehicles involved?

A. Yes, sir.

Q. Did you proceed at once to the Hudson?

A. I did.

Q. Did you ascertain there had been some people seriously injured?      A. Yes, sir.

Q. What if anything did you then do?

A. Well, it was obvious that the driver of the vehicle was dead. His scalp had been pared back. The passenger to this right, female, she appeared to be dead, but the registered nurse at the scene said she felt a bit of pulse. And I had ordered the ambulance before I left Flagstaff and upon arrival of the ambulance we removed the female passenger into the ambulance and she was taken into Flagstaff.

Q. She was an adult?      A. She was an adult.

Q. After that was done, Roy, what did you do?

A. I should say first when I got to the scene of the accident it had been reported the car had been afire. And also before I left Flagstaff I had ordered the fire department to send a truck out there and to douse the fire or if it were out to hose the area down to lessen the degree of fire hazard. The fire truck

(Testimony of Roy H. Bryfogle.)

drove up soon after I arrived [336] and I ordered the driver of the truck to hose the area down, whatever was necessary to cut through the gasoline and oil.

Q. Was there quite a bit of it there?

A. Quite a bit.

Q. You have spoken, Mr. Bryfogle, of debris. Did you notice where the debris was and how far it extended along the highway?

A. It was over quite an area, but I couldn't tell you exactly how far.

Q. Beginning with the Hudson car easterly, could you give us an idea how far it extended to the east, or do you remember?

A. There was no debris to the east of the Hudson—pardon me, no debris to the west. All the debris was to the east of the Hudson on the highway.

Q. Would you have any recollection as to how far it extended?

A. I couldn't give you any measurements on it, but it extended to the east of the macadam patch.

Q. Beyond the macadam patch?

A. Beyond the macadam patch.

Q. I don't remember whether I asked you or not, but with respect to this macadam patch, the east boundry and west boundry, where was the Hudson car located?

A. The Hudson was to the west of the macadam patch. [337]

Q. I believe you stated faced in a southwesterly direction?

A. Yes.

(Testimony of Roy H. Bryfogle.)

Q. You observed, I presume, extensive damage to the Hudson? A. It was a total loss, yes, sir.

Q. Prior to the time the highway had been hosed down, Roy, did you have any opportunity to make a careful examination of the surface of the highway? A. No, sir.

Q. Subsequent to the time when the highway had been hosed off or whatever you want to call it, did you make any examination?

A. Prior to it, no; after I did, yes.

Q. When did you make that examination?

A. Well, I made a cursory examination after the deceased had been removed from the vehicle. The coroner's jury came out. The coroner ordered the body removed and we removed the body. I made a visual check and ordered Mr. Veazey to remove the Hudson from the highway so we could flow traffic by.

Q. Tell me, Roy, what was the condition at that hour of the morning with respect to east and west bound traffic, was it heavy or light?

A. It was unusually heavy that night. [338]

Q. Did you at that time meet or talk to the driver of the truck that was involved?

A. I spoke to him very briefly.

Q. Did you notice his physical condition at the time?

A. He was in a mild state of shock I would say.

Q. How soon after the accident or how soon after you arrived did you talk to him, if you recall?

A. I don't recall.

(Testimony of Roy H. Bryfogle.)

Q. You did observe he was in a state of at least semi shock at the time? A. Yes, sir.

Q. Did you ask him what had occurred?

Mr. Palmquist: Immaterial, if your Honor, please, self serving.

The Court: He may answer this question.

A. Yes, I asked him what occurred.

Q. All right now. At the time when you questioned him, I believe you have stated it was there at the scene of the accident? A. Yes, sir.

Q. Had the coroner's jury arrived?

A. I don't believe they had arrived yet.

Q. The bodies or body at least was still in the car? A. Yes, sir.

Mr. Wilmer: We submit, your Honor, under the circumstances [339] it is part of the *res gestae*.

Mr. Palmquist: Self serving, if your Honor please.

Mr. Wilmer: If it please the Court, I believe the rule is of course discretionary, but where it has occurred the courts have held as much as thirty minutes to an hour.

Mr. Palmquist: It is clearly hearsay, if your Honor please.

The Court: There is an exception under the rule.

Mr. Palmquist: I know, but it is self serving.

Mr. Wilmer: If the man is in a state of shock in the presence of the accident as it existed, with the conditions unchanged, it seems to me it is for the jury to decide whether what he said at that

(Testimony of Roy H. Bryfogle.)

time is self serving or whether he was in fact speaking——

Mr. Palquist: The jury has heard him here, your Honor.

The Court: Proceed with the question. There is no question as yet.

Mr. Wilmer: I am sorry, your Honor.

Q. (By Mr. Wilmer): Will you tell us, Mr. Bryfogle, what Mr. Ripka told you at that time as to how the accident occurred?

Mr. Palmquist: We object to that, your Honor, on the ground it is self serving. [340]

The Court: Objection sustained.

Q. (By Mr. Wilmer): Did you observe whether or not Mr. Ripka had been injured?

A. I don't believe he was injured, no, sir.

Q. Did he stay there at the scene of the accident or go to the hospital?

A. No, sir, I sent him in in the ambulance.

Q. Roy, after the coroner's jury had arrived and viewed the body and the coroner had ordered the removal of the body and it was removed, then did you go about seeing about the other details of the accident? A. Yes, sir.

Q. Was the debris and other matter that was on the highway to the east of the Hudson removed from the highway? A. How was it?

Q. Was the debris, the clothing, the articles of property scattered along the highway, was that removed from the highway? A. Yes, sir.

Q. How soon, do you recall?



(Testimony of Roy H. Bryfogle.)

A. Well, there were bits of metal in the west bound lane of traffic. We had one lane of traffic open and these chunks of metal, I picked up some after I ascertained the condition of the occupants of the Hudson, I picked it up and either throwed it to to the north or the south of the [341] highway, whichever I was closest to. And after the coroner had decided to have the body removed I as well as other bystanders, I asked them to pick up the debris and let's get it off the road, and we did so.

Q. In other words, the highway was cleared up fairly quickly after the coroner had ordered the removal of the body?      A. Yes, sir.

Q. Mr. Bryfogle, when did you begin or attempt to make a study of the accident or scene of the accident?

A. I made some fast measurements before the Hudson had been towed away from the position it came to rest at, with my tape.

Q. Yes. Then I believe you did take some pictures at the time?

A. Yes, sir, before it was removed.

Q. Those were flash pictures?      A. Yes, sir.

Q. After the situation quieted down to where you could go to work on the details of the accident what did you do, what examination did you make?

A. Well, dawn was nearly breaking after I had the Hudson pulled over. I don't believe I did a darn thing, I went in to town.

Q. And the purpose of that?

(Testimony of Roy H. Bryfogle.)

A. I went in to question the female occupants. the [342] remaining occupants of the Hudson.

Q. Who did you talk to?

A. The eldest girl of the group.

Q. Did you ask her anything with respect to—I presume you went to ask her with respect to what she knew about the accident? A. Yes, sir.

Q. Did she tell you anything with respect to any sleeping tablets that were involved, rather No-Noz tablets?

Mr. Scoville: Is this impeachment?

Mr. Wilmer: Yes.

Mr. Scoville: His question must be in the proper form.

Mr. Palmquist: They weren't sleeping tablets. They were the opposite, No-Doz tablets.

Mr. Wilmer: I think we all understand that, if it please the Court.

Q. (By Mr. Wilmer): Mr. Bryfogle, I mis-spoke. Did you talk to the eldest girl, do you remember her name?

A. I would have to get my report out.

Q. Do you have your report?

A. Yes, sir. She was the eighteen and one half year old girl at the time, Norma Jean.

Q. I see. What did she tell you?

Mr. Scoville: I object to that on the ground it is not [343] the proper form for an impeaching question. The only reason it would be admissible would be for impeachment of this other witness and it is not the proper form.

(Testimony of Roy H. Bryfogle.)

Mr. Wilmer: I agree with counsel.

Q. (By Mr. Wilmer): Will you tell us, Mr. Bryfogle, at that time and place if this young lady told you her father had been taking No-Doz tablets?

Mr. Palmquist: If your Honor please, she has testified to that in this case.

Mr. Wilmer: She has denied that, your Honor, She stated her father bought some but she denied that she told Mr. Bryfogle he had been taking it.

The Court: I believe her testimony was that she didn't know whether he had been taking it.

Mr. Palmquist: That is right.

Mr. Wilmer: I asked the question, if it please the Court, if she had not told Mr. Bryfogle if she had not told Mr. Bryfogle that he had been taking them and she said not. I believe that is correct, your Honor.

The Court: All right.

Mr. Scoville: Withdraw the objection.

A. Yes, she did.

Q. You then went back to the accident, did you?

A. Yes, sir.

Q. What did you do then? [344]

A. I made my usual investigation, but prior to that I started going through the Hudson, looking for the evidence of these tablets.

Q. Did you find them? A. Yes, sir.

Q. What did it consist of?

A. A small metal box that had been severely bent in in some manner within the car after I imagine it made the collision.

(Testimony of Roy H. Bryfogle.)

Mr. Palmquist: Just a minute. Did you say metal box?

The Witness: Yes, sir.

Q. (By Mr. Wilmer): Do you still have that?

A. Yes, sir.

Q. Did you bring it with you?

A. I have, sir.

Q. This is in the same condition as when you removed it? A. Yes, sir.

(Defendants' Exhibit D marked for identification.)

Q. (By Mr. Wilmer): I hand you Defendants' Exhibit D, Mr. Bryfogle, and ask you if that is the box you found and which you have kept in your possession since? A. Yes, sir.

Mr. Wilmer: We offer it in evidence.

Mr. Palmquist: May I see it, counsel. Could I ask a question? [345]

The Court: Surely.

Q. (By Mr. Palmquist): Was this found in the car or the man's pocket?

A. As far as I remember it was found in the car.

Q. Didn't you write it down, Officer? You wrote everything else down?

Mr. Wilmer: That is not voir dire, if it please the Court.

Mr. Palmquist: He said as far as he remembered, your Honor.

The Court: This is voir dire.

Q. (By Mr. Palmquist): Yes. Well, have you

(Testimony of Roy H. Bryfogle.)

had this open? A. I looked in it before, yes, sir.

Q. You have had it open?

A. I opened it once.

Q. Were there more tablets in it than——

A. There was one tablet in it. That was the contents of it.

Mr. Palmquist: All right. We have no objection to this going in.

The Court: It may be received.

(Defendants' Exhibit D marked in evidence.)

Q. (By Mr. Wilmer): Now, Roy, did you then make a physical examination of the scene of the accident to determine what if any marks you might find at that time? A. Yes, sir. [346]

Q. What effect if any did you observe, if you did observe any, as to the effect on the pavement of the Diesel fuel, the gasoline and the action of the fire department in washing the pavement off?

Mr. Scoville: Objection, if your Honor please, as to his conclusions and as its effects. He can do the same thing we have been limited to, what he saw then and what he saw afterwards and so on, not his conclusion.

Mr. Wilmer: I am asking what he saw.

Mr. Scoville: You ask him what the effects were.

Mr. Wilmer: I asked him what effects did he observe.

Mr. Scoville: That is the same thing.

Mr. Wilmer: I am asking him to tell what he



(Testimony of Roy H. Bryfogle.)

saw if he saw anything. If he didn't see anything he can say so.

The Court: The witness may tell what he saw.

A. When I ordered the fire truck operator to hose the area down I watched what he was doing because I didn't wish to get sprayed with the substance he was using and I kept out of his reach, out of the area there and he was spreading the liquid substance on the pavement, scattering debris and everything else, cutting through the gasoline that was on the pavement.

Q. (By Mr. Wilmer): Did you observe whether or not he used a broom on the pavement?

A. No, after he stopped using the nozzle with the liquid in it I didn't pay a bit of attention to him. [347]

Q. Mr. Bryfogle, after you went back the next morning did you take some additional pictures?

A. Yes, sir.

Q. Did you at that time take pictures of any marks upon the pavement which you observed and which you attributed to the movement of the cars in the accident?

A. Yes, sir.

Q. Did you at that time or through the morning of that day come to a tentative conclusion as to the point of impact on the highway?

A. I did.

Q. Did you at a subsequent time change that opinion, Mr. Bryfogle?

A. I did.

Q. Now, when did you finally complete your investigation of the accident, if you recall? When did you finally figure you had done all you could do

(Testimony of Roy H. Bryfogle.)

to determine what the facts were insofar as the evidence showed there?

A. I investigated that accident, I should say, three or four days after the darned thing. At various times I would go out and look at the scene and re-examine it and re-examine it again.

Q. Did you on July 10th prepare and send in your report of the accident? A. Yes, sir. [348]

Q. Had you at that time completed your investigation of the accident?

A. Well, I had completed it as far as the report goes because I had to get that thing in within twenty-four hours, I am required to do it. I put down exactly what I had found but I had still not finished it.

Q. Will you tell us, Mr. Bryfogle, what your first impression or opinion was as to on what portion of the highway the impact had occurred?

A. The marks on the pavement indicated the truck was—may I look at my report?

Q. Sure.

A. A deep indentation in the highway on the west bound lane, which is north of the center line, five feet two inches north, had been caused by some metal digging into the macadam.

Q. And you tentatively concluded that was the point of the impact, is that correct?

A. Yes, sir.

Q. Now, from that point is that where you began your measurements to where the Hudson car

(Testimony of Roy H. Bryfogle.)

was when you say you made the quick measurements?      A. Yes, sir.

(Defendants' Exhibit E marked for identification.)

Q. (By Mr. Wilmer): I am going to hand you Defendants' Exhibit E for identification. I am not sure whether this is [349] the right one or not, but will you examine it and tell me if that is the indentation you had reference to?      A. Yes, sir.

Q. Would you take a pen if you have one and make an "X" on that, the indentation you have reference to.

A. I have a ball point; it won't make much impression.

(Witness marks on exhibit.)

Q. (By Mr. Wilmer): I am referring to Defendants' Exhibit E, the point you have marked "X," what you initially concluded was the point of impact.      A. Yes, sir.

Q. From that point will you tell us where the Hudson was located on the pavement?

A. From that indentation on the pavement I measured forty-one feet to the left front of the Hudson.

Q. And in what direction?      A. West.

Q. And that placed the Hudson car then off the west edge of the macadam patch, did it?

A. Yes, sir.

Q. And then from that point did you also sub-

(Testimony of Roy H. Bryfogle.)

sequently run measurements to the position of the truck?      A. Correct.

Q. What distance did you find the truck had traveled from that point? [350]

A. The truck had traveled at an angle eighty-nine feet from the edge of the concrete from that indentation; and from the edge of the concrete it continued on one hundred one feet before it came to rest. That was to the left rear edge of the left rear duals of the semi where it had gone off the road on the north side.

Q. Roy, did you make an examination of the truck and of the undercarriage of the truck?

A. Yes, sir.

Q. Underside of it. When did you make that examination?

A. I made it that morning, made it the following morning.

Q. Did you observe what had occurred to the front wheels and axle of the truck?      A. Yes, sir.

Q. What had occurred to them?

A. At some point in the collision the front axle had been broken loose so that it was at an angle to the nose of the truck. The wheels were shoved back under—the left front wheel would be shoved back under the cab.

Q. Had it been carried fully back under the tractor to the back drivers, if you remember?

A. Close to it, if I recall.

Q. Were you able to find on the undercarriage of the truck anything that indicated a gouging into

(Testimony of Roy H. Bryfogle.)

the pavement by the truck? [351]                      A. No, sir.

Q. Did you at a later time—I believe the following day—make yourself a personal investigation of the Hudson?                      A. Yes, sir.

Q. Were you able to find under the undercarriage of the Hudson any indication of a gouging of the pavement?

A. No, sir, except the left front wheel.

Q. And that consisted of what?

A. The tire obviously had blown and the flange of the wheel had worn down where it had made contact with the pavement of sorts.

Q. The flange had been worn down?

A. Yes, sir.

Q. You stated to us, Mr. Bryfogle, you subsequently came to a conclusion that your first impression was wrong. Will you tell us the physical facts that lead you to that conclusion?

A. Well, I changed my mind on this whole deal as I took what evidence I had found to the County Attorney's office to see whether I could get a complaint, explained to Mr. Mangum's assistant, Ted Flick what I had. He said I had absolutely no case, I couldn't corroborate what facts I had found. He refused me a complaint.

Q. That was Mr. Flick?

A. Mr. Flick. [352]

Q. Mr. Bryfogle, with respect—

Mr. Scoville: If your Honor please, I move the answer, the question and answer be stricken and the jury admonished to disregard it. Whether or not



(Testimony of Roy H. Bryfogle.)

the County Attorney thought this case would support a manslaughter charge or negligent homicide or not is wholly irrelevant to any issue in this case and the jury should be instructed to disregard it.

Mr. Palmquist: This is not a criminal case.

The Court: The jury will disregard the statement of the witness as to what the Deputy County Attorney told him.

Q. (By Mr. Wilmer): Mr. Bryfogle, later in careful examination of the pavement did you find any additional——

Mr. Scoville: Just a minute, Mr. Wilmer, before you answer. Go ahead and finish your question.

Q. (By Mr. Wilmer, continuing): Did you in the next day or two, I believe you have stated, made additional trips and additional investigation and examinations of the pavement.

Mr. Scoville: I will withhold the objection. Go ahead.

A. Yes, sir.

Q. Will you tell me, Mr. Bryfogle, whether or not on the southerly half of the pavement you found some skid or tire marks which you thought might or probably might be connected with the accident?

Mr. Palmquist: Just a moment, if your Honor please. The only thing I want to make certain on that is at what time, [353] what time. Something twenty-four hours later or two or three days later that then shows up on the southerly edge is different——

Mr. Wilmer: If the answer to that is he did I will ask him when.

(Testimony of Roy H. Bryfogle.)

Mr. Palmquist: No, but my objection to the question, your Honor, it was too broad. He could have been out there the other day.

The Court: Counsel says if he answers that he did he is going to ask him when.

Mr. Palmquist: Fine.

A. I didn't find those marks, they were pointed out to me by another party.

Q. Who was that? A. Roy Wacker.

Q. Was Mr. Dale Slocum there with you at the time? A. I don't recall.

Q. What type of tire marks were those?

A. They were impressions on the pavement where some heavy vehicle had had its brakes set instantly.

Q. Where were they with respect—this was when now?

A. I couldn't tell you, the next day or two.

Q. Within the next day or two? A. Yes, sir.

Mr. Palmquist: Just a moment. Did I understand that [354] answer correctly, within the next day or two?

The Witness: I couldn't say exactly when, no sir.

Mr. Palmquist: I wanted to understand your answer.

Mr. Wilmer: His answer was it was within the next day or two. It was very clear.

Mr. Palmquist: All right, fine.

Q. (By Mr. Wilmer): You did examine them, did you? A. Yes, sir.

Q. Did their position and existence on the highway have anything to do with your feeling with

(Testimony of Roy H. Bryfogle.)

respect to where the point of impact would be and might have been?

Mr. Scoville: Objected to. We are not interested in his feelings, we are interested in what he saw and what was there, not in whether it changed his feelings about it.

Mr. Wilmer: I mean his opinion.

Mr. Scoville: Or his opinion for that matter. That is the ultimate question.

The Court: Counsel has permitted him to give his opinion earlier. The time for your objection on the statement of his opinion was when——

Mr. Scoville: All right, if that is open now that is fine.

Mr. Palmquist: We are relying on this police report. Go ahead.

Q. (By Mr. Wilmer): Tell me, Roy, since that is the [355] situation do you have your report you made? A. Yes, sir, I have a copy of it.

Q. Would you let me have it, please. Is this the complete report?

A. That is part of it. This is the rest of it.

Mr. Wilmer: We ask this be marked for identification and offer it in evidence.

Mr. Palmquist: Can we see it?

Mr. Wilmer: Surely.

Mr. Palmquist: Is this the original report?

The Witness: It is a photostatic copy.

Mr. Palmquist: Where is the original?

The Witness: Still in the Phoenix office.

(Testimony of Roy H. Bryfogle.)

(Defendants' Exhibit F marked for identification.)

Q. (By Mr. Wilmer): Is Defendants' Exhibit F for identification a true carbon copy of the original report you filed as of July 10th?

A. Yes, sir.

The Court: You said carbon copy.

Mr. Wilmer: One is carbon and portion is photostat, your Honor.

Mr. Palmquist: We submit, if your Honor please, we have a photostat furnished to us by the Arizona Highway Patrol. We have no objection to the true report going in and here is the full and true report, counsel. We will stipulate [356] to that all going in. It is furnished to us. But this doesn't look like that.

Q. (By Mr. Wilmer): Will you examine this, please, Roy, and tell me what if anything in that is not a part of this matter that you handed me?

Mr. Palmquist: If your Honor please, those documents speak for themselves.

Mr. Wilmer: I am asking the witness if he can tell me he manifestly knows there is something in there that should be in here.

Mr. Palmquist: That is something for the jury to decide.

The Court: I will let the witness answer if there is anything in the papers he has that is not included in the Exhibit F for identification.

(Testimony of Roy H. Bryfogle.)

The Witness: It is the same as the one I have there. I got it from the same copy, my original.

Mr. Palmquist: Would you mind using our copy, counsel?

Mr. Wilmer: No, I will use the one I know is correct. If you want to point out where it is incorrect.

Mr. Palmquist: I will point out several. Will you come here, counsel. Those two pages are there; where are the rest of these pages? And where is this page? Then where is this page? Where is this writing here?

Mr. Wilmer: Here it is. [357]

Mr. Palmquist: Is that it?

Mr. Wilmer: That is right.

Mr. Palmquist: Where is this part?

Q. (By Mr. Wilmer): Roy, this instrument here which is headed "Arizona Highway Patrol fatality sheet," was that part of your report that you made July 10th?

A. I gave this to the County Attorney and coroner.

Q. That is not part of this? A. No, sir.

Q. That is not part of your report?

A. No, sir.

Mr. Palmquist: If your Honor please, that came from the highway Patrol.

The Witness: One report is sent in——



(Testimony of Roy H. Bryfogle.)

The Court: That is counsel's statement. I don't know anything about it.

Mr. Wilmer: May I see if I can clarify it. I don't think it makes too much difference, your Honor. I have no objection to including in it the sheet which is the additional fatality report and I will ask Mr. Bryfogle if this is correct. If it is correct we will agree it is correct and dispense with any formality in proving it.

The Witness: Yes, sir, that is my report.

Mr. Palmquist: May I see those reports, counsel. Counsel, if you say they are the same—— [358]

Mr. Wilmer: The only thing is there is the additional report of yours which is the fatality report.

Mr. Palmquist: Your Honor has ruled on certain of these things as to statements the truck driver made. This contains some statements as to what the truck driver said. We object to that portion of the report.

Mr. Wilmer: If the report is admissible it is admissible as a whole as part of his report. We offered it because counsel said he was relying on it.

Mr. Palmquist: We will let it all in when you exclude the improper part.

The Court: Counsel has offered it as a whole and says he withdraws it if you gentlemen object to it.

Mr. Palmquist: We maintain our objection.

Mr. Wilmer: Very well. Then I ask permission to withdraw it.

The Court: Very well.

(Testimony of Roy H. Bryfogle.)

Mr. Palmquist: All right.

Mr. Wilmer: Then you can complete it without me coming [361] back. Would you mark those three for me, please?

(Defendants' Exhibit G marked for identification.)

Q. (By Mr. Wilmer): Handing you an exhibit which is Defendants' Exhibit G, consisting of three pictures, will you tell me, please, Mr. Bryfogle, if you examined the two-wheel utility trailer?

A. Yes, sir.

Q. I believe that the box had been broken off and the stuff all scattered? A. Yes, sir.

Q. Did you make any examination particularly with respect to the tires on that? A. Yes, sir.

Q. I hand you this exhibit and ask you to look at the three pictures and ask you if they correctly represent the condition of the tires of the trailer and the physical damage which you observed to the tires?

A. Yes, sir, that is the utility trailer and the tires.

Q. With respect to the second picture, which is that of the utility trailer, when you viewed it after the accident had the tongue been bent and twisted in the direction which it appears there?

A. That is the way we found it, yes, sir.

Mr. Wilmer: We offer G in evidence.

Mr. Palmquist: May I see it. I will stipulate these [362] may be admitted.

(Testimony of Roy H. Bryfogle.)

The Court: They may be received.

(Defendants' Exhibit G marked in evidence.)

Mr. Wilmer: Cross-examine.

Cross-Examination

(Continued)

By Mr. Palmquist:

Q. Mr. Bryfogle, you have no interest in this case, do you? A. None whatsoever.

Q. I asked you a question, I said when you went out to the scene of this accident, did you call for a Mr. Wacker?

A. Called for an insurance adjuster.

Q. Did you call for Mr. Wacker?

A. I called for the Arizona Insurance Adjusting Agency.

Q. You didn't send out any call for the agency that protects dead and injured people?

Mr. Wilmer: We object to the question as being improper.

The Court: Objection sustained.

Q. (By Mr. Palmquist): You called for the Arizona—what was this again?

Mr. Wilmer: If it please the Court, we object on the ground it is immaterial and of no consequence in this matter.

Mr. Palmquist: I think this goes right to the motives, if your Honor please.

Mr. Wilmer: Very well, we will withdraw the

(Testimony of Roy H. Bryfogle.)

objection [363] if counsel feels that way. Go right ahead.

Q. (By Mr. Palmquist): What was this party you called for?

A. Called for Arizona Adjustment Agency. I called for an adjustment agency every time I have a bad accident.

Q. Does the Highway Patrol—is that the law of the state of Arizona:

A. It is a custom we use here.

Q. Oh, a custom? A. Yes.

A. You mean that is how you treat injured people in this state?

Mr. Wilmer: Object to as being improper cross-examination.

Mr. Palmquist: I will withdraw the question.

Q. (By Mr. Palmquist): All right, did a man in response to that call come out there?

A. Yes, sir.

Q. Who was it? A. Roy Wacker.

Q. Did you know Roy Wacker?

A. I have known him for a number of years.

Q. A good friend of yours?

A. He is just a business acquaintance.

Q. Does he take care of you at Christmas time?

A. I don't know Mr. Wacker socially at all.

Q. Will you answer my question?

A. Nobody takes care of me at all. [364]

Q. What does he do for you at Christmas time?

A. He doesn't do anything for me.

Q. What did he do for you concerning this ac-

(Testimony of Roy H. Bryfogle.)

ident?           A. Not a thing.

Q. Didn't he hold the end of the tape for you?

A. He assisted me in my investigation.

Q. And as a matter of fact, he has been assisting you in this investigation ever since that night, hasn't he?

A. Both sides have been assisting me.

Q. Who have you seen from our side of the case? Have I ever talked to you?

A. Never saw you before.

Q. All right. You were having an argument with Mr. Wacker out there this very noon, weren't you?

A. I haven't had an argument with anybody.

Q. Let's go back to your original conclusion and the conclusion you now say you have. Would you step down here. You testified that you measured some marks, and I think we have got a picture of those marks, the picture taken by you. Then I have Plaintiff's 19. It is a large blow-up. Do you recognize this picture?           A. Yes, sir.

The Court: Is that 19?

Mr. Wilmer: 19-A.

The Court: One of them is in evidence and one isn't.

Mr. Palmquist: I will get this in evidence now.

Q. You also recognize Plaintiff's 37 as a blow-up of the same view, do you not? [365]

A. Yes, sir.

Q. Those are your pictures, aren't they?

A. Yes, sir.

Q. That is what you saw out there when the sun



(Testimony of Roy H. Bryfogle.)

came up so you could really see things the morning of that accident when you were taking pictures?

A. Yes, sir.

Q. You saw Glen Flake here the other morning, he came down from Snowflake to testify?

A. Yes, sir.

Q. You have been down here ever since, haven't you?

A. Yes, sir.

Q. Mr. Flake told us he had protected the north side of this lane where these marks are until you came back with your camera; when you came back with your camera was he still there?

A. I had my camera with me all the time.

Q. Did you go into town? You said you went in with some injured people or something?

A. I went in to question the other parties.

Q. You came back and that is when you took these pictures?

A. Yes, sir.

Q. And this is a true and correct representation, this Plaintiff's 37 for identification?

A. Yes, sir. [366]

Mr. Palmquist: We offer it in evidence at this time.

Mr. Wilmer: If it please the Court, counsel the other day stated that was a darker exposure of this same picture.

Mr. Palmquist: He took it——

Mr. Wilmer: Just a moment. Counsel made this statement that this is a darker exposure for the purpose of obliterating or cutting out certain marks from the scene.

(Testimony of Roy H. Bryfogle.)

Mr. Palmquist: That is not so. Do you want to take the stand and be sworn?

Mr. Wilmer: I ask the Court to examine as to equal clearness an equal sharpness. I will withdraw the objection. I think the jury can look at both of them.

Mr. Palmquist: This man said he took both pictures.

Mr. Wilmer: He didn't take the enlargements. We have no objection.

The Court: 37 may be received.

(Plaintiff's Exhibit number 37 marked in evidence.)

Q. (By Mr. Palmquist): Now, I would like to have you step down here. The scale of this map is one inch equals three feet. Here is that culvert, here is the western edge of the black top, here is the eastern edge. And just disregard all marks that are on there. We have even put in these guideposts for you. I would like to have you draw in the marks you were trying to photograph that you said led up to the truck. Will you do that? [367]

A. May I have my report, please?

Q. I don't have your report.

(Document handed to witness.)

Q. (By Mr. Palmquist): You said they began five feet, two inches north. Here is the scale north of the white center line. Here is five feet right there.

(Testimony of Roy H. Bryfogle.)

Mr. Scoville: That is already to scale. I mean by that, that isn't inches.

Q. (By Mr. Palmquist): Perhaps we should start with some point. Do you know where the truck was for sure when the accident happened?

A. Yes, sir, where it came to rest.

Q. Yes. That is where you made your measurements, was to the left rear duals, wasn't it?

A. You mean where it came to rest?

Q. Yes. In fact, your measurements went up to the left rear duals or right rear? A. Left rear.

Q. That is one you can count the guideposts on there. Let's locate that truck first, then measure backwards.

A. Let me ask you a question. This guidepost is counted in on the three, or this one here?

Q. I don't know which one you are talking about.

A. I don't either. Just about where my car is parked, to the right of the front circle. [368]

Q. Yes.

A. Is that this one here? It couldn't be.

Q. That is right.

A. This is incorrect here. It should be taken on down. Should be over here somewhere.

Q. All right. Those marks started in this black patch, didn't they?

A. They started about in here. You mean the tire marks?

Q. Yes. As a matter of fact, you took a picture of some of those marks, didn't you? A. Right.

Q. Is this a picture of it?

(Testimony of Roy H. Bryfogle.)

A. Are those clear? Show me the original.

Q. This is the original, is it not?

A. That is right. That is the mark——

Q. That is the mark that is five feet, two inches?

A. No. The mark five feet, two inches isn't shown on those. That is the indentation shown on the macadam.

Q. This is a fresh mark?

A. These were fresh marks.

Q. Were these as fresh as fresh can be?

A. It happened some time during the collision.

Q. No question about it?           A. No question.

Q. In fact, the asphalt, when you looked carefully the [369] asphalt was rolled up to the east end of that mark?

Mr. Wilmer: I don't like to interrupt, but our record—I have no objection to the scene, but I would like to have it marked.

Mr. Palmquist: Do you have any objection to this going into evidence?

Mr. Wilmer: None in the slightest.

(Plaintiff's Exhibit 45 marked in evidence.)

Mr. Palmquist: Will you go ahead and be drawing those marks?

A. Which ones do you want?

Q. The ones you said were made by the truck, eighty-nine feet to the edge of the pavement; one hundred-some feet off the pavement.

A. I can't because it isn't wide enough here.

Q. Run it as far as the map goes.

(Testimony of Roy H. Bryfogle.)

This green mark here wasn't on there, was it? That was just a mark you made?

A. That is to identify where I am starting from.

Q. Will you put an arrow on that so we won't have any confusion.

The Court: I understand, counsel, you have a picture.

Mr. Palmquist: Yes, we do have one here.

The Court: What is it?

Mr. Palmquist: Plaintiff's 28. [370]

The Court: 49 for identification will be withdrawn.

Q. (By Mr. Palmquist): Show them like they were made by a dual wheel, as you see them in these photos.

A. That is the best I can do for you.

Q. Will you put those in on the right, too. You know what the tread of the truck was, don't you?

A. What do you mean?

Q. The tread of the truck was eight feet, wasn't it, center of wheel to center of wheel?

A. If you say so. I didn't measure it.

Q. Make a parallel line as indicated in these photographs. A. From the inside to the inside?

Q. That is outside to outside. That would be about seven feet from the outside dual to outside dual.

Wait a minute, where is that Plaintiff's 19? None of those marks were south of that center line, were they, Officer?



(Testimony of Roy H. Bryfogle.)

A. According to your eight feet it gets down here.

Q. When you saw them out there they weren't, were they?

A. I never measured the beginning of the tracks. I measured the indentation in the concrete; it went from here.

Q. Was that the right rear dual or left rear dual that you measured? That is what I am trying to find out. Will you look at your report?

A. I measured from the indentation to the left rear dual. [371]

Q. Will you show me where that shows on your report?

Mr. Wilmer: The report has been excluded from evidence, I believe.

The Court: The report is not in evidence.

Mr. Palmquist: He said he had refreshed his memory, if your Honor please.

A. One hundred one feet to edge of concrete from left rear duals.

The Court: Just a moment. It is impossible for the reporter to follow anything like this. You have your back turned and walk around the room. Nobody could take that.

The Witness: The indentation, eighty-nine feet to the edge of concrete; one hundred one feet from edge of concrete to left rear duals.

Q. (By Mr. Palmquist): While you are here, Plaintiff's Exhibit 28, do you have that? This mark here now——

(Testimony of Roy H. Bryfogle.)

Mr. Wilmer: Please. I object. He says, "This mark here." Can you give us something to have on the record?

Mr. Palmquist: I started to before I was interrupted. I will repeat it. Plaintiff's Exhibit 28, this mark here, being the edge, the easterly edge of the asphalt mark, that is correct, isn't it? You notice the contour of that?

A. Yes. That is the easterly edge.

Q. Right there, I am going to make an arrow pointing to it, is the mark which was a very clean, very fresh mark, right? [372]

A. Right.

Q. We will call that arrow "A." And right here, looking closely, you see at the end of arrow "B" the rolled-up portion of some asphalt caused by an object moving in which direction?

A. Easterly.

Q. Easterly. No question about it?

A. No question.

Q. In other words, the thing that made this mark here had to be going easterly, which is like arrow "C," right?

A. Correct.

Q. So that these marks weren't made by something going westerly, but going easterly, right?

A. Right.

Q. Right here was another one of those marks, arrow pointing, we will call that arrow "D," right?

A. Right.

Q. That was really clean, no doubt about that being fresh, was there, Officer?

A. It was right down in the concrete, fresh.

(Testimony of Roy H. Bryfogle.)

Q. Down at the end of this was one of these rolled-up tufts of this asphalt?

A. Yes. Not as noticeable as your "B."

Q. There is no question but what that was made by either a car or trailer being shoved in an easterly direction, was there? [373]

A. Something went east.

Q. Something went east. All right.

(Exhibit handed to jury.)

Q. (By Mr. Palmquist): This is something else that went east, this truck and trailer on Plaintiff's Exhibit Number 32, that stopped where I have made arrow "A," on it, right? A. Right.

Q. Those dual marks shown here by arrow "B" and also by arrow "C" here lead right into the duals of that trailer, isn't that correct? A. Correct.

(Exhibit handed to jury.)

Q. (By Mr. Palmquist): And here on Plaintiff's Exhibit Number 25, this again is the same trailer, right? A. Right.

Q. And here are those same duals, you can see them coming right down the highway, can't you, as you have drawn in these marks? A. Right.

(Exhibit handed to jury.)

Q. And the marks the jury are now looking at on Plaintiff's Exhibit 28, here again you can see that indentation, can't you? A. Yes, sir.

Q. You notice we have two types of arrows,

(Testimony of Roy H. Bryfogle.)

“R-2” arrows and “R-1” arrows. You see the “R-1” arrows mean the tracks [374] that lead to the truck. You have to stand back just a little bit to see that. Do you see that?

A. I see what you are getting at.

Q. The marks made as indicated by the “R-1” arrows were made by different type tires than were made by the “R-2” arrows, right? No question about that?

A. Yes, they cross over here.

Q. No question about that, is there? These “R-2” marks were not made by the dual wheels of that truck or tractor trailer, were they?

A. No.

Q. The only other vehicle involved in this accident was a Hudson car with a two-wheel trailer, right?

A. Right.

Q. If you hold this back so you get the view you can see that all there very clearly on Plaintiff's Exhibit 19-A, as you saw it that day, and that was why you took this photograph, wasn't it, Officer?

A. What is on there, that is what I took, yes.

Q. Yes. And that same thing can be seen here if you hold it out, you can see those same marks on there and those weren't really skid marks, were they, Officer, they were more friction marks, the wheels are turning but not turning fast enough and still leave a—what do you call that rubber [375] mark?

A. Traction.

Q. Yes.

A. From here on in these, I know nothing about these here, but from the edge of the macadam directly to the truck, these marks were left by the rear

(Testimony of Roy H. Bryfogle.)

duals when the brakes had been set. He had a device on the truck similar to a railroad, you can break your air line and they lock. Due to his weight he went forward.

Q. That is the only time the brakes got on?

A. I don't know when he put his brakes on.

Q. You know this, the Hudson never got its brakes on?           A. No indication of it.

Q. No indication at all. And no indication the truck ever got its brakes on?

A. That evidence disappeared, if there was any.

Q. Do you remember there was quite some difficulty in getting the dead man out of the car?

A. Some difficulty, yes, sir.

Q. In fact, you had to get a cable from Mr. Vincenzes' car and attach it to the post and drag that car away before you got him out?

A. Whose car?

Q. The Hudson.

A. We got a cable, hooked on the wrecker and pulled it away—Veazey, you mean? [376]

Q. Yes. Before you had Veazey do that, that was why you took a picture, so there would never be any question as to the location of that car, isn't that correct? In fact, you took two different pictures, did you not? I will show them to you, they are in evidence, Plaintiff's Exhibit 16 and Plaintiff's 15. Before you ever had the cable on that car and pulled it you took some pictures?

A. That is right; I took two shots of it.



(Testimony of Roy H. Bryfogle.)

Q. So there would never be any question as to where the car was pulled to?

A. This is before the car was moved.

Q. Yes. And that was before the dead man was taken out?

A. Correct. I took two pictures. I was afraid one might not turn out. That is why I took them.

Q. If you look underneath that car and you compare that with Plaintiff's Exhibit 28, which the jury is now looking at, which are the marks here? Let's just hold these up there, if you will. Hold the top, Plaintiff's 28, and I will hold these bottom ones. You place this edge of this asphalt up here?

A. Yes.

Q. We have another picture in evidence. Hold this one, too. You can see this part right there, can't you?

A. Right.

Q. And this part is right here where it quits, isn't it? [377]

A. Right.

Q. Then following on over, you see how this comes in here, goes out——

Mr. Wilmer: If it please the Court, I am going to object——

The Court: Objection sustained.

Mr. Wilmer: I object again to counsel asking the witness to interpret the pictures. We have twelve men here capable of interpreting the pictures.

Mr. Palmquist: I am asking him to refresh his memory.

Mr. Wilmer: That is not asking him to refresh his memory.

(Testimony of Roy H. Bryfogle.)

Q. (By Mr. Palmquist): I will ask you, Officer, if this doesn't refresh your memory, that the car was here exactly where Mr. Wedgeworth and Mr. Cook and other witnesses have placed it, with its left front just over this edge of this asphalt with its rear end sticking out?

A. You mean to the east of the macadam?

Q. Yes. A. No.

Q. Of course when you took your pictures it had been dragged down here? A. Oh, no.

Q. Except for these two pictures, these are the only two pictures you took before it was moved, isn't that correct? [278]

A. That is right. No, your car came to rest over here.

Q. Wasn't the car pointing in a westerly direction? A. Southwesterly.

Q. Southwesterly. And the way I am indicating it, the bottom of these pictures is southwesterly?

A. Yes.

Q. All right. You may be seated.

Mr. Palmquist: I would like to have the gentlemen of the jury look at these four. If your Honor please, counsel offered me a picture here that he had the witness make a mark; it to be photo number 02876, by Dale L. Slocum——

The Court: Is that E for identification?

Mr. Palmquist: It is Defendants' Exhibit E for identification. I will offer this as my exhibit.

Mr. Wilmer: I should have offered it. I thought I had.

(Testimony of Roy H. Bryfogle.)

Mr. Palmquist: I will accept counsel's statement as to when this was taken. Can you tell me the date?

Mr. Wilmer: Look on the back of it, I think it shows.

Mr. Palmquist: No, it doesn't.

Mr. Wilmer: It was either the 12th——

The Court: Do you want to offer it, Mr. Wilmer?

Mr. Wilmer: Yes, I will offer it.

The Court: It may be received as E in evidence.

(Defendants' Exhibit E marked in [379] evidence.)

Mr. Palmquist: Counsel has shown you a picture and with some difficulty with the pen, and you see that "X" on there, you made an "X" as an indentation on the highway? A. Yes.

Q. That is on the north side of the white line, is it not? A. Yes, sir.

Q. You said that was the indentation which you thought to be the point of impact?

A. Yes, sir.

Q. Which is five feet, two inches north of the north white line, is that right? A. Right.

Q. And which side of the road is that for which driver?

A. That is in the westbound lane of traffic.

Q. For people going to California, like Mr. Sanders? A. Yes, sir.

Q. That would have been Mr. Sanders. What portion of his car would be at that point of impact?

(Testimony of Roy H. Bryfogle.)

A. I don't know. I don't know what caused that.

Q. It would be the left front corner of his car, would it not? A. I don't know.

Q. There was no doubt in your mind the day you conducted this investigation, was there? [380]

A. The day I conducted that investigation, in my coroner's report, I said I had not completed it.

Q. You said that today. Did you say that at the coroner's inquest?

A. I believe it is in the inquest.

Q. Let's read the inquest. I call your attention to page 7. Let's go through from the very beginning, your testimony, you read with me.

Mr. Wilmer: If it please the Court, we object to counsel reading. We have no objection to having the witness examine it and if he finds any statement to the effect that he hadn't completed it, but reading the whole inquest is certainly improper.

The Court: The impeachment part of the document is the part——

Mr. Palmquist: All right.

Q. (By Mr. Palmquist): Do you remember testifying at the coroner's inquest? A. Yes, sir.

Q. The question was asked of you—you told them that Roy Wacker held the tape for you, did you not? A. Yes, sir.

Q. And do you remember, you said: "Will you give to the coroner and jury the results of your observations and measurements?" Answer: "As near as I can"—— [381]

Mr. Wilmer: Just a moment. This is not im-

(Testimony of Roy H. Bryfogle.)

peachment. I don't know what basis counsel is attempting to do this.

The Court: Let's get to the impeachment questions, if there are any.

Mr. Scoville: The problem here is this. The witness has said that he was uncertain and indefinite. We would like to offer the whole of this very short testimony at the inquest to show there was no indefiniteness, no uncertainty, positive, direct testimony and conclusions, on not only one day but two on the 10th and when the inquest was completed three days later on the 13th. When he said he was uncertain and indefinite we think this is impeaching. The only way you can do is offer it all.

The Court: I will have to read it.

Mr. Palmquist: Very well.

The Court: Gentlemen, at this time we will recess for about ten minutes.

(Recess.)

The Court: I have read the coroner's inquest transcript that counsel handed me. I will not permit the reading of the transcript by way of impeachment.

Mr. Palmquist: No portion of it, you mean, your Honor?

The Court: I will require you to proceed as you do on impeachment. I am not going to permit it at this time.

Mr. Palmquist: Will you hand the officer the transcript? [382]



(Testimony of Roy H. Bryfogle.)

Q. (By Mr. Palmquist): Officer, I call your attention to page 7, to the answer you gave, starting with line 3 and ending on line 7.

You have read that? A. Yes.

Q. I will ask you whether or not that answer was given in response, talking about the indentations on the highway at the point of impact we have been looking at in these photographs?

A. I assume that is what caused it.

Q. I will ask you whether or not on July 10th, 1954, the very day of this accident, in response to this question asked by the coroner before the coroner's jury and at the coroner's inquest:

"Q. Did you observe any abrasions or wearing that would indicate any indentations caused by the Hudson?

"A. Not as yet, no, sir. The left front tire of vehicle number 2 was demolished."

That vehicle number 2 was which car?

A. The Hudson.

Q. "The left front tire of vehicle number 2 was demolished. It blew out and the rim of this left wheel was bent, flattened out in places. That, I assume, caused the indentations in the highway."

Did you give that answer? [383]

A. Yes, sir.

Q. Was that a true answer?

A. That is what I thought at the time.

Q. Then I ask you to look on page 9 where Mr. Dryden, a juror, asked you a question, starting with

(Testimony of Roy H. Bryfogle.)

line 10 and going on down to line 19. You finished that?       A. Yes.

Q. I will ask you whether or not these questions were asked——

Mr. Wilmer: Just a minute, if it please the Court, this is not impeachment. The witness testified that his initial opinion and impression was just what he was testifying at the coroner's jury. If I understood, the purpose of this was to see if some place in here he said he hadn't completed his investigation. He hasn't denied he originally so thought and testified.

Mr. Palmquist: This is impeachment and cross-examination, if your Honor please.

The Court: Impeachment of what, sir?

Mr. Scoville: We haven't been able to ask this question yet.

The Court: I have read the transcript and the witness in several places in there says: As far as I have been able to ascertain, or, in my best opinion in matters such as this.

Mr. Palmquist: He doesn't say that in this instance. [384]

The Court: No, but you have got to take the thing as a whole. This started out to be a question if he didn't express himself at the inquest as having a positive, firm, fixed opinion about the accident, unchangeable opinion. I have read the transcript and to expedite things I will say to counsel that I can't find that in there.

Mr. Palmquist: We will point it out to your

(Testimony of Roy H. Bryfogle.)

Honor and this is one of the places we will point it out right now: Page 9, line 12, one of the jurors asked the question. That is a matter of the weight of the evidence, your Honor. That is for this jury to determine. Page 9, starting with line 10 down to line 19.

The Court: The difficulty with that, counsel, is if you will turn back to page 6——

Mr. Palmquist: We offered to read it all. I will renew my offer. Perhaps counsel will stipulate. Will you stipulate to this whole transcript going in?

The Court: If you will let me finish, please. If you turn back to page 6 of the transcript, it is obvious the witness is stating only an opinion where the cars were with reference to the white line. I am not going to permit you to read page 9 when I know that page 6 will put a very different aspect on the contents of page 9.

Mr. Palmquist: In view of your Honor's remarks before this jury, comments, I feel, that now we are entitled to have [385] this whole transcript read to this jury.

The Court: I have expressed myself on the matter that is before the Court at this time.

Mr. Palmquist: I know, but it goes to the very weight of all of this now. And we feel very earnestly, in view of your Honor's remarks, it must be read to this jury so they can use their own judgment.

The Court: The Court has ruled on whether it will be or not.

(Testimony of Roy H. Bryfogle.)

Mr. Palmquist: I will offer it through the Court, to stipulate with counsel that this whole transcript be read.

Mr. Wilmer: It appears to me, if it please the Court, that counsel is simply playing fast with the Court. He has ruled. He knows I am not going to stipulate. We ask he proceed with the examination.

The Court: Let's proceed.

Mr. Palmquist: Very well.

Q. (By Mr. Palmquist): Isn't it true that on the 10th of July, right after you investigated that accident, there was no doubt in your mind and you stated positively that the truck was on the wrong side of the highway when the collision occurred and the Hudson was on its right side?

A. I had no proof of it, it was just an opinion. I still don't know what happened.

Q. As a matter of fact, the proof was that every indentation, [386] every tire mark, every bit of debris, every bit of glass and metal was north of the center line, isn't that correct?

A. Not every bit.

Q. Can you name one thing that you found prior to and including the 13th day of July when you last testified before that jury at Flagstaff, that you found south of the white line?

A. I believe I stated before that prior to the clearing up before the fire worked and after the fire hose worked I was on both sides of the highway throwing junk left and right, north and south. There were no marks on the pavement on the south,

(Testimony of Roy H. Bryfogle.)

they were all on the north, but the debris was all over the place.

Q. As a matter of fact, do you remember a camera that was picked up out there by the Flagstaff officer?

A. No, sir.

Q. There was a camera, was there not, found west of this culvert and in the north ditch, do you recall that?

A. I know nothing about the camera.

Q. Well, Officer, when this trailer trunk bent, as it did here—you see how that is bent?

A. Yes, sir.

Q. When that bent like that the contents that were in there were catapulted, weren't they?

A. They were strewn all over a great area.

Q. They took on a certain direction, didn't [387] they?

A. Not any positive direction.

Q. Do you remember some birthday napkins?

A. No.

Q. You don't remember that?

A. I don't remember anything I picked up other than picking it up and throwing it out of the road. I had no concern with anything other than clearing the traffic.

Q. Will you look at this and say when this man's birthday was?

A. It was the day he was killed.

Q. This was his birthday, wasn't it?

A. Yes.

Q. And there was indication his family was celebrating his birthday with him?



(Testimony of Roy H. Bryfogle.)

Mr. Wilmer: He is getting clear outside the bounds of materiality, if it please the Court.

Mr. Palmquist: If your Honor please, there was testimony concerning birthday napkins.

The Court: I think as far as there is any materiality in that, it has been established there were birthday napkins out there.

Q. (By Mr. Palmquist): You can't even remember the birthday napkins? A. No.

Q. You don't remember a camera? [388]

A. No.

Q. Do you remember anything that was picked up? Name some of the objects picked up?

A. I repeat, when I picked the stuff up I threw it, removed the objects, I threw it off the highway. Mr. Veazey brought his pickup truck and loaded the debris on it.

Q. Let me understand this. When you came out there, you found two dead people in the car?

A. One dead person. One died in the hospital or on the way to the hospital.

Q. I believe you said she was in the front seat, too, is that correct?

A. When I came to the scene of the accident she was in the right front, as I recall. I don't recall, but she was still in the car. The nurse was by her side.

Q. You mean with those two dead people and the little injured girls, wasn't one of those girls trapped in the car?

A. Not in the sense you say trapped, no; she had easy access out the right side.

(Testimony of Roy H. Bryfogle.)

Q. Didn't you have trouble getting one of them out, one of the girls out of the rear?

A. They had a lot of stuff in the car, they had to crawl over it.

Q. Didn't you have some trouble getting the rear door open?

A. I think they came out the front door, I don't remember. [389]

Q. You remember, Officer, under those circumstances you are going up and down the highway throwing stuff off the highway?

A. I will tell you what caused me to do that. As passing traffic would pass in the eastbound lane you would hear them run over it; rather than have another accident, I ascertained I couldn't help the driver, the nurse was taking care—she was a registered nurse—she was taking care of the one that possibly could still be alive. She could do a much more adequate job than I could; I went and started helping clean up the road, which is part of my duties.

Q. You mean there was traffic going by here without paying any attention to these injured and dead people?

A. Yes.

Q. As a matter of fact, Officer, when you arrived out there there was a big truck blocking both lanes of travel?

A. No, he was blocking the westbound lane. He was blocking the scene.

Q. He had pulled across to block both lanes, hadn't he?

A. No, I got around him.

(Testimony of Roy H. Bryfogle.)

Q. There was another man there with a flash-light stopping traffic and traffic was being stopped?

A. To allow the flow of one-way traffic.

Q. And they kept the traffic out of this north-bound lane, right? [390]

A. Correct—you mean the westbound lane?

Q. As a matter of fact, at the time you took the pictures of the dead man in the car there was no traffic flowing through there at all, is that correct?

A. Oh, no, they were flowing through. I have no right to stop traffic unless the road is completely blocked, then I have no control over it.

Q. Regardless of what you said or didn't say, do you think the left rear wheel of that Hudson, being in the condition it was in, could have caused the indentation in the pavement?

A. I don't know. It could have. I don't know what caused those indentations.

Q. All right. Then, Officer, as a matter of fact, was there anything about this washing process that so much emphasis has been put upon that would have caused marks to be washed away south of the center line and marks north of the center line to remain?

A. It wouldn't wash away marks.

Q. You weren't suggesting to this jury then that sprinkling of that water on the gasoline out there to prevent a fire washed any evidence away?

A. It washed evidence away that we used for proof of where the point of impact was, such as dirt knocked from fenders, glass and other things that

(Testimony of Roy H. Bryfogle.)

fall from the vehicles when they make contact, possibly fused pieces of metal. [391]

Q. You saw Phil Cook come out there, did you not? A. Yes, sir.

Q. He has testified he saw debris on the north side of the center line, I guess you saw such debris?

A. Yes.

Q. You were the man that was there to investigate this accident, weren't you? A. Correct.

Q. And one of the things you knew would be very important in this case, particularly when you saw those injured children and the dead parents, was the point of impact? A. Right.

Q. And as a trained officer—you have had F.B.I. school training, haven't you? A. Yes, sir.

Q. You have also been down to the University of Arizona for the course they give there?

A. No, sir.

Q. What training have you had in the investigation of these accidents besides the F.B.I. school training?

A. I was an accident investigator for the New York Police Department for darned near two years. I handled all in my district. I had intensive training by the New York P. D.

Q. How close to two years is "darned near two years"? A. About eighteen months. [392]

Q. You must have learned the value of the point of impact then? A. Correct.

Q. Did you learn one of the important things was to keep people from destroying evidence?

(Testimony of Roy H. Bryfogle.)

A. I also found out through the carelessness of bystanders with cigarettes for highly inflammable material, my first thought was to protect as much as possible the area there, and if some fool had dropped a lighted cigarette or a match or something, poof. That is why I ordered the Fire Department to come out there.

Q. You were out there before they got there?

A. Right.

Q. In fact, Flick even got there before they got there?

A. Right.

Q. They didn't come along until at least twenty minutes after you got there?

A. They came there soon after I got there, I don't know how soon.

Q. You had at least twenty minutes of walking around there? You weren't just out there protecting personal property that you didn't want to get run over, were you?

A. It takes time for one to ascertain the condition of the people, secondly, as I have explained to you before, my primary purpose is to flow traffic through there without [393] causing a jam, without causing additional hazards. That was when I went around and picked up some debris and threw it off the road. The traffic was flowing through there east and west at all times, first a movement east and then west. How soon the fire truck got out there I don't know, but as soon as he did come out there he washed it down. In fact, I believe Flick had



(Testimony of Roy H. Bryfogle.)

passed him getting to the accident, but that I am not sure of.

Q. Is it your testimony then, so we can understand you, that you didn't have time to observe before this washing process took place the important debris that you needed to help you establish point of impact?

A. That is right; I didn't have the opportunity or I would so state.

Q. Did you explain that to the coroner's jury on July 10th when you told them you established the point of impact as five feet, two inches north of the white line?

A. They didn't ask the questions. I didn't volunteer the answers unless they asked them.

Q. Did you or did you not tell that coroner's jury on July 10th, 1954, that you found the point of impact five feet, two inches north of the white line?

A. I found what I assumed to be the point of impact, but I wasn't sure. I still am not sure.

Q. You mean you are still not sure? [394]

A. I don't know what happened in that accident, no.

Q. Well, now, I thought you said a day or two later you changed your mind. That was when I interrupted and said, "What was that answer," and you said, "A day or two"—

A. I changed my mind that the vehicles had met—they had met somewhere on the road there, but I have not made any definite statements as to who caused the accident or where it was caused or what

(Testimony of Roy H. Bryfogle.)

caused the indentations in the pavement. I don't know.

Q. Officer, you don't need F.B.I. training to know the vehicles met some place there on the road, do you?      A. Right.

Q. You don't need F.B.I. training to know that when they met things began to explode?

A. Right.

Q. And the pavement got scratched?

A. Right.

Q. Tires began to lay down marks?

A. Right.

Q. You didn't need F.B.I. training to go out there and take a look and see marks and say whether they were north or south of the center line, did you?      A. No.

Q. Just good old common sense would do that, wouldn't it?

A. I had nothing to corroborate it though. [395]

Q. Wouldn't common sense do that?

A. It wouldn't do any good with me in a court of law. I had nothing to back it up.

Q. We will get to you in a minute. I want to know what happened a day or two later that caused you to change this opinion when you told that coroner's jury July 10th that this accident happened north of the center line, that caused you to change your mind?

Mr. Wilmer: If it please the Court, counsel is again going back into the matter assuming, he is stating to the jury and in the presence of the jury

(Testimony of Roy H. Bryfogle.)

what is in the transcript, which your Honor has ruled out.

The Court: He is asking him——

Mr. Palmquist: He said he wasn't——

The Court: If counsel wouldn't argue the matter. Counsel has asked the witness what occurred to cause him to change his mind. I will permit him to answer that question. But the series of questions that counsel has been asking him about, whether you need F.B.I. training for this or that, that is purely argument.

Q. (By Mr. Palmquist): All right. What happened a day or two—are you talking about July 11th now or July the 12th?

A. In that area there. I am not talking about any specified date. I have not chronologically measured my movements or made notations of my movements. [396]

Q. You said, it was your words, was it not, "A day or two later"? A. Yes.

Q. Would a day later be July 11th?

A. In a way the 11th would be another day, because it started out so early, and it could have been the 12th. And it could have been the 13th. I have been out there so darned many times I couldn't tell you.

Q. Who have you been out there with?

A. Myself. I went out with Roy Wacker and I went out with myself for my own edification.

Q. You remember on July 13th, that would be three days later, wouldn't it? A. Yes, sir.

(Testimony of Roy H. Bryfogle.)

Q. Do you remember on July the 13th, 1954, at 10:50 o'clock a.m., the coroner's inquest reconvened with all members of the jury being present, Shelby McCauley, Esquire, Justice of the Peace and Ex Officio Coroner, in and for Flagstaff Precinct, in and for the County of Coconino, State of Arizona, and a jury of six. You remember that?

A. Yes, sir.

Q. July 13th, 10:50 o'clock a.m. Do you remember by that time the eldest daughter had arrived to identify the parents, right?

A. Yes, sir. [397]

Q. Do you remember at that time a juror asked you again where the point of impact was——

Mr. Wilmer: Just a moment, counsel——

Mr. Palmquist (Continuing): ——and you referred to your notes——

Mr. Wilmer: Just a moment, counsel.

Mr. Palmquist: May I finish, counsel?

Mr. Wilmer: No. I object to counsel standing before the jury and reading from what appears to be the transcript.

Mr. Palmquist: I am not reading. I am asking him if he remembers.

Mr. Wilmer: That is something trying to transgress the Court's ruling earlier.

Mr. Scoville: It is some time, your Honor, it is one or two days and this is the 13th.

Mr. Wilmer: I have no argument about that.

The Court: Ask him if he was asked this question and made that answer.

(Testimony of Roy H. Bryfogle.)

Q. (By Mr. Palmquist): Do you remember that you were called back up to the stand by Mr. Dragonette, by one of the six jurors, and he asked you this question: "The only question really I have to ask, Mr. Bryfogle, is whether this truck was actually occupying part at least of the wrong lane of the highway, that is, part of the Sanders' vehicle's lane?"

And do you remember you gave the answer: "Yes, sir." [398]

A. Yes. The left wheels of the duals show that. I don't deny he was parked in the wrong lane.

Q. "Yes, sir," right? A. Right.

Q. And do you remember Mr. Dragonette then said: "Q. Approximately how much, just about?" And you answered: "Just a second. " Then: "(The witness refers to his notes.)" Then you said: "The point of impact where both vehicles met was five feet, two inches in the westbound lane of traffic, in the Sanders' lane." Do you remember giving that answer? A. If you say it is there, it is there.

Q. I will ask you to read it.

Mr. Wilmer: The witness has admitted it. There is no occasion to take time to have him read it.

The Court: It isn't necessary to do that.

Q. (By Mr. Palmquist): Then do you remember Mr. Dragonette asked you, he says: "It was a corner-to-corner collision rather than a direct head-on collision?" And you answered: "Yes, sir. The left front of both vehicles made contact."

"Q. In other words, there is reason to presume



(Testimony of Roy H. Bryfogle.)

that had the truck been on his own lane there would have been no crash at all?" And you answered: "Yes."

Do you remember giving those answers on July 13th?      A. All right.

Q. Is that right? [399]

A. That is right. He was over in the other lane with his wheels.

Q. Well, now, somebody has been working on you for a long time up there at Flagstaff as the year has gone by, haven't they?      A. Not a bit.

Q. What?      A. Nobody works on me.

Q. As a matter of fact, this Mr. Wacker—that was your testimony on July 13th; there was no question in your mind, the impression you left with that coroner's jury, was there?

A. In the beginning I said I assumed, and I have assumed all along. I have nothing to prove it happened there. I have had nobody work on me.

Q. As a matter of fact, you are trying to create on this jury in this Federal Court a very different impression than the jury of six up there at the Coroner's inquest?

A. I don't know what happened. I have told that to your side of counsel and I have told that to Mr. Wilmer, I don't know what happened.

Q. As a matter of fact, you broke your neck trying to get this truck driver arrested for negligent homicide, didn't you?

A. It is a custom of the Patrol to cite somebody. If the County Attorney won't do it I am clear.

(Testimony of Roy H. Bryfogle.)

Q. Do you remember talking to Mr. Harold Scoville here [400] last Saturday for the first time?

A. Yes, sir.

Q. The first time he ever talked to you about this case?

A. Yes, sir.

Q. Do you remember honestly the conversation you had with him?

A. I don't remember—I remember what it is about. What I said, I don't recall.

Q. Do you remember telling him this Roy Wacker, as you put it, had been working on you for a long time about these marks?

A. He worked on me after the accident. He brought me out and pointed things out to me.

Q. Now, you mean he took you out here and said, "Look. Look at these marks"?

A. He pointed those other dual tracks in the other lane of traffic, the eastbound lane of traffic.

Q. As a matter of fact, that was after the 13th, more than three days after traffic—and I assume traffic was allowed through here on the 11th if they were allowed by when the dead people were there?

A. Nobody stopped them.

Q. They were allowed by there on the 11th, the 12th and 13th; and you mean some time later, as you told Mr. Scoville, this insurance man took you out there and showed you some [401] marks, that you didn't see there before, is that right?

A. I didn't see them, no.

Q. Could you see them when he took you out

(Testimony of Roy H. Bryfogle.)

there and showed them to you some time after the 13th?

A. I don't remember seeing them except when he pointed them out in the picture. I didn't connect them with the accident.

Q. You mean he didn't take you out there and point them out on the pavement, he showed you some in a picture?

A. He took me out and took me over the scene.

Q. Did you see the marks at the scene?

A. I don't remember seeing the marks at the scene; I saw them in a picture that was taken.

Q. You don't know by what device those pictures were taken?

A. I know who took the pictures and I didn't fix it up with the accident or connect it with the accident.

Q. That man that took the picture wasn't there at the accident, was he?      A. No.

Q. You saw these pictures some time quite a bit later in the year after this thing had been testified to and so forth, isn't that right?      A. Right.

Q. Would you come down here and finish these lines out for me so I can get those marks there? So there will be no confusion on these, I will make these the arrows. This is [402] where it left the concrete?      A. Yes.

Q. I am continuing the length, you say we ran out of paper.

A. You want me to continue——

Q. You said there were no marks?

(Testimony of Roy H. Bryfogle.)

A. Yes, you have them in the picture.

Q. Can you show me marks south of the center line in the picture?

A. You showed me right duals.

Q. Show me those marks south of the center line.

A. That is too blurred, I can't. You asked me to finish a picture eight feet——

Q. I asked you finish the length.

Mr. Wilmer: You asked him to measure over eight feet and draw a corresponding line.

Mr. Palmquist: You mean you told him to do this at recess time.

Q. (By Mr. Palmquist): I asked you to come down here and finish the length. You know what I want you down here for.

A. What have we got?

Q. Are you confused?

A. I want the smaller one.

Q. How long were those marks, Officer? I was simply interested in the length. You have got them started.

A. How long are they? [403]

Q. Yes. Here is all I want you to do. You told us it was eighty-nine feet from where they started to where they left the concrete. You said it was one hundred one feet—start out here and measure out one hundred one feet.

A. You wanted me to put it by the post is where we ran into difficulty.

Q. I want you to measure out here one hundred one feet, will you?

A. It is three feet to the inch?

(Testimony of Roy H. Bryfogle.)

Q. That is right. Thirty inches would be ninety feet. It is one hundred how many feet?

A. One.

Q. Add another eleven feet on it.

A. That would be one hundred thirty-three feet if there is three feet to the inch. Thirty makes it ninety, ninety-three, ninety-six, ninety-nine, one hundred, one hundred one. Somewhere in the vicinity here.

Q. All right. Those were obviously made by that truck and tractor, right? A. Yes.

Q. Now, you have got it off the highway and it actually was off the highway and off the asphalt, is that right? A. Yes.

Q. How far was it off the asphalt, did you measure that?

A. Not off the asphalt. I had it measured from the center [404] line, dividing line of the pavement, rather, from the edge of the concrete.

Q. All right, edge of the concrete is where, how far was it over?

A. The right rear duals were nine feet, five inches.

Q. Right rear—— A. Right rear duals.

Q. So to the right rear duals, and that measurement—— A. Nine feet, five.

Q. ——was nine feet, five inches, right rear duals? A. To the right rear duals.

Q. You may be seated. So it was the right rear duals you measured after all, not the left?

A. No; that is the right rear duals from the edge



(Testimony of Roy H. Bryfogle.)

of the concrete. I measured the left rear duals from the supposed point of impact to where it came to rest.

Q. All right. Did you say you never did have any idea what happened in this accident?

A. Not a clear idea, except two cars met, but what caused them to meet I don't know.

Mr. Palmquist: May I have this identified?

Q. You drew a picture of what you think happened, didn't you?

A. That is an opinion I have to send in to the Patrol.

Q. Do they want sound opinions or just want guesses? [405]

A. They want opinions.

(Plaintiff's Exhibit 50 marked for identification.)

Q. (By Mr. Palmquist): They want you to look in a crystal ball and come up with something, or want you to make judgments based on certain facts?

A. They want me to make it in the best of my ability in the short time that is allowed.

Q. By the way, Officer, NoDoz pills, have you ever taken one?

A. No.

Q. Do you consider these a dangerous——

Mr. Wilmer: If it please the Court, this is not proper cross-examination.

Mr. Palmquist: He has brought these in here.

The Court: The witness is no qualified expert in whether they are dangerous or not.

Q. (By Mr. Palmquist): You know the motor

(Testimony of Roy H. Bryfogle.)

laws of Arizona. Is there some law against taking a NoDoz pill?

The Court: He is not an expert on the law either.

Q. (By Mr. Palmquist): All right. Did you find a mark on the left side of the Hudson as you looked at that arrangement out there—I would like to have you look again at Plaintiff's 20? Do you remember making the statement that the left front wheel of that truck just ran right up over and upon that car?

A. It would appear so, something ran up and over it. [406]

Q. That is your honest opinion and is even today, isn't it, when you look at that bumper and that wheel, something had to happen to drive that bar from the top down through this man's head?

Mr. Wilmer: This man is not an expert in interpreting pictures. Let the jury look at the pictures and make up their own mind.

Mr. Palmquist: This is the expert they brought in here.

Mr. Wilmer: I didn't bring him in as an expert to interpret the pictures. They speak for themselves.

The Court: We will let the jury judge what the pictures show.

Q. (By Mr. Palmquist): Officer, regardless of this picture, did you express that as your firm, honest belief that that truck actually ran over that Hudson?

A. That is just one of my opinions what happened. I could conjure up a couple of them.

(Testimony of Roy H. Bryfogle.)

The Court: The question is, did you express that opinion?

The Witness: I expressed an opinion subsequent to that, yes, sir.

Q. (By Mr. Palmquist): Did you get that from looking in some crystal ball or did you get it from looking at the evidence of the accident?

A. I looked at the wheels of the semi, which were smashed back, the obvious demolished car. Something on the truck went [407] over the car. Something caused the wheels of the truck to get smashed back.

Q. Is that one of your firmly fixed opinions or is that one you have, then don't have?

Mr. Wilmer: This is argumentative, if it please the Court, and getting us nowhere.

The Court: I will let him answer. Do you still have that opinion?

A. I have that among others, yes, sir. That is one of my opinions.

Q. (By Mr. Palmquist): You use the word "conjure up, conjure up"? A. Yes.

Q. I fail to understand what you mean by that, Officer, conjure up. You conjured this up?

A. No. No, you grasp a lot of ideas out of the air.

Q. Well, Officer, you take sides in these cases before you even investigate them?

A. I never take a side in any case, no, sir, except when I have a criminal action.

Q. Do you know—what is the name of this outfit? A. Arizona Adjustment Agency.

(Testimony of Roy H. Bryfogle.)

Q. You are certainly taking sides when you call them, aren't you?

A. No. I don't tell them to come out for a specific party. [408] Sometimes they are with me and sometimes they are against me. The last time I was in this Court we were opposite and he was called on that.

Q. Well, you have got the guy out there holding the tape with you.

A. I have to have someone holding the tape for me.

Q. Wasn't Officer Flick out there? Don't you get a follow up?

A. Officer Flick was concerned with directing the flow of traffic past the area. Someone had to protect the area and ourselves out there.

Q. Well, as a matter of fact, this man was there as quick as you were, isn't that correct, this Wacker?

A. No.

Q. In fact, he could have picked some things up and thrown them around if he wanted to?

A. Maybe he did. A lot of people did at my direction to clear the road. Then we cleared the area of bystanders.

Q. He could go around and ask people, "Did you see this accident, what is your name and address," and so on, right, right there at the scene?

A. He could, but he didn't?

Q. How do you know he didn't?

A. Because if I catch them doing it once I never allow them on the scene of an accident again. I have

(Testimony of Roy H. Bryfogle.)

them out there to [409] assist me as much as possible without taking one side or the other.

Q. You are doing the taxpayers a favor, saving the taxpayers' money to save hiring an officer, is that why he goes along?

A. In an action such as this I need all the help, all the qualified help I can get. The usual help you can get from a bystander isn't worth a darn. They will hinder you more than help you. If I can get someone I know to assist me as much as possible until the danger is cleared up, until the injured are out of the area and the road is clear, I will accept anybody's help.

Q. Mr. Carl Mangum might be interested in hearing from you, you might——

The Court: Counsel, I am going to ask you to please finish your cross-examination in the next fifteen minutes.

Q. What is in it for Mr. Wacker; he got out of bed to go out there, didn't he? A. Yes, sir.

Q. 3:00 o'clock in the morning, July 10th? Do you pay him for that service you say he renders?

A. No, sir.

Q. He has a distinct motivation of going then, I take it?

A. He comes out to assist me and assist himself. He handles about ninety-nine per cent of the motor carriers on [410] the road, his agency does or the agency he works for. If I have a Greyhound in an accident, I call another adjustor that I know handles for the Hound.



(Testimony of Roy H. Bryfogle.)

Q. Who do you call that might be interested in preserving evidence for dead people that cannot help themselves?

Mr. Wilmer: If it please the Court, we object to it as argumentative, certainly will serve no useful purpose in getting anywhere.

Mr. Palmquist: Your Honor, I think we are getting to something pretty vital.

Mr. Wilmer: Go right ahead, counsel.

The Court: You are assuming something, counsel, maybe you will have to reframe your question.

Q. (By Mr. Palmquist): You call anybody—I am just wondering if I was coming through Arizona with my wife and my children and I should suddenly be killed and my little youngsters be out there on that highway, would there be anybody there to represent my children and me as well as——

The Court: Counsel, that is a speech, not a question. Let's be reasonable about this thing.

Mr. Palmquist: If your Honor please, I believe he is taking sides.

The Court: I can note your manner and tone of voice, what you are going into. I am asking you not to make a speech.

Mr. Palmquist: All right. I have no questions. I will [411] handle it in argument.

(Testimony of Roy H. Bryfogle.)

Redirect Examination

By Mr. Wilmer:

Q. Mr. Bryfogle, if you were to complete the green line that you started down here, which you were initially requested by counsel to draw, that would continue on from this point on to the additional distance, wouldn't it?           A. Yes, sir.

Mr. Wilmer: That is all.

We have a few questions from Mr. Ripka, your Honor. I will try to be as brief as I possibly can.

GILBERT RIPKA

recalled as a witness, having been previously sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. Gilbert, I am not going to cover anything that has been covered before, so be on your toes, will you please?

At the time you stopped at Kingman before this accident, I believe you testified a friends of yours woke you up?           A. Yes, sir.

Q. Who was that?           A. Mr. Al Solomon.

Q. Then you proceeded easterly, did you?

A. Yes, sir. [412]

Q. Did you leave in company with Mr. Solomon?

A. No, sir.

Q. Did he leave ahead of you?

(Testimony of Gilbert Ripka.)

A. Mr. Solomon left ahead of me.

Q. Did you later come upon him?

A. Yes, sir.

Q. What happened?

A. He had a couple of tires flat and I loaned him one of my tires. We had to break it off the rim and change rims. This is at Saligman.

Q. Then did you have an arrangement to meet him to pick up your tire later?

A. Yes, sir, at Flagstaff.

Q. What kind of rig was he driving with respect to being heavy or not heavy, with respect to yours?

A. He has a five-axle rig, consists of a three-axle tractor and a two-axle trailer.

Q. Was he faster or slower?           A. Slower.

Q. You went on ahead of him, did you?

A. Yes, sir.

Q. At the time you left him at Saligman until the time of the accident, did you stop again?

A. Yes, sir.

Q. Where did you stop? [413]

A. About a mile before the Ordnance Depot.

Q. That would be west of the accident?

A. That would be west of the accident.

Q. How did you stop, what did you do?

A. I stopped and checked my tires, checked my equipment and more or less gazed around, took in the scenery for a few minutes, got back in and took off.

Q. Were you running ahead of Mr. Solomon?

A. Yes, sir.

(Testimony of Gilbert Ripka.)

Q. Could you hear him coming?

A. No, sir. I listened for him at the time to see if I could hear him pulling a grade.

Q. I take it you were going to have to stop at Flagstaff in any event to let him catch up with you to get a tire?

A. Yes, sir.

Q. You told us with respect to the accident—I am not going into that again, Gilbert, with one exception. Counsel asked you to draw the area or indication of the area in which you believe the accident occurred, and you drew this line which he has marked with a dotted mark. The question as he asked it to you I do not believe is clear, but I would like to have you explain what you meant by that circular area there as to the portion of the highway where the accident happened.

Mr. Palmquist: Just a moment, if your Honor please, that is cross-examination of his own witness. [412]

The Court: I am going to let him explain what he meant by drawing it up there, by his answer to the question.

Q. (By Mr. Wilmer): Gilbert, just tell us. You were asked to draw or indicate where the accident occurred. Will you tell us what you meant to indicate by drawing that circle?

A. I meant it was the east and west portion of the highway, not the north and south. It was the south of the line the accident happened, but it was the length that I meant to express in the line.

Q. The length, that is the segment of the high-

(Testimony of Gilbert Ripka.)

way in which it occurred?      A. Yes, sir.

Q. Did you intend to indicate by that you were or were not sure whether it was on the north or south half?      A. Will you repeat that?

Q. Have you ever had any question in your mind whether the accident happened on the north half or south half of the highway?      A. No, sir.

Q. You have never had any doubt?

A. There is no doubt in my mind.

Q. Tell me, Gilbert, you have been driving for ten years I believe?      A. Yes, sir.

Q. Cover a good part of the United States? [413]

A. Yes, sir; all of it.

Q. This rig you were driving, whose property was that?      A. That belonged to me.

Q. It belonged to you?      A. Yes, sir.

Q. I believe you had one of your children?

A. Yes, sir.

Q. You have other children, do you?

A. Yes, sir.

Q. How many?

A. I have two other children.

Q. With respect to this mattress that you carry with you——

Mr. Scoville: Just a moment. He testified it was a blanket two or three times, not a mattress.

Mr. Wilmer: Blanket, I am sorry. I withdraw "mattress."

Q. I believe you stated you have something with you you used when you laid on the ground and slept?      A. It was an Army comforter.



(Testimony of Gilbert Ripka.)

Q. An Army comforter? A. Yes, sir.

Q. How thick was it?

A. Folded up double it would be the thickness of a light mattress.

Q. Why did you carry that with you? [414]

A. Because various times when the weather was warm or rather hot I would stop and sleep under the truck because it would be cooler than sleeping in a hotel or motel. And I found I got a lot better sleep that way.

Q. With respect to your driving about the country, Gilbert, what has been your custom and habit if you find yourself becoming at all tired or sleepy?

A. I generally stop and sleep—I always stop and sleep.

Mr. Palmquist: Can we make sure you got that in the record?

(The last answer was read.)

Q. (By Mr. Wilmer): Now, where the weather is bad and so on, then what do you do?

A. If the weather is bad, cold, generally stop at a truck stop.

Mr. Wilmer: Cross-examine.

### Cross-Examination

By Mr. Palmquist:

Q. You got this Army blanket at the same time you got that training in your split vision?

Mr. Wilmer: That is argumentative, if it please the Court, improper cross-examination.

(Testimony of Gilbert Ripka.)

A. No, sir; I bought this Army comforter off Army war surplus.

Q. (By Mr. Palmquist): Since the time you came up here and [415] we went over this very carefully, have you talked to Mr. Wilmer about this area "R-3" and he told you he was going to put you back on the stand? A. Yes, sir.

Mr. Palmquist: No further questions. Mr. Reporter, will you write up that part of the record for me, the portion dealing with "R-3"?

#### Recross-Examination

By Mr. Wilmer:

Q. Gilbert, since counsel has raised the question, I believe you were asked what you meant to indicate and you told me, and I told you I would put you back to tell the jury? A. Yes, sir.

Mr. Wilmer: That is all. We have nothing further, your Honor.

The defendants rest.

Mr. Palmquist: We rest.

The Court: Gentlemen, that is all of the evidence in the case. There remains the argument of counsel and the instructions of the Court. They will take some considerable period of time, so we will have those on Monday. Because we have matters set earlier in the morning on Monday I will ask you to come back at 10:30, if you will, please. At that time the matter will be argued to you by counsel and the instructions will be given and the case will

be submitted to you. [416] However, until the case is submitted to you the admonition given heretofore is still binding. Don't discuss the case with anybody else and don't make up your minds about the case until it is submitted to you. You are excused until 10:30 Monday morning.

(Jury retires from the courtroom.)

The Court: If I may, I would like to ask you to come in Monday at 9:00 on instructions. And may I say this is the way I would like to handle it: At that time I will pass on your requests and give you an opportunity there to make your record. I will ask you to make your record on the requests there. I will also give you at that time certain instructions that I have myself prepared, some of them after viewing the instructions you have tendered. I will ask you also to make a record on those instructions at that time. I will have some stock instructions that you won't hear or see, and may it be stipulated that as to those, counsel, after the jury has retired, may then make a record on any objection or exception they may have to parts of the instructions?

Mr. Palmquist: So stipulated.

Mr. Wilmer: So stipulated.

(Whereupon, a recess was taken until Monday, August 9, at the hour of 9:00 o'clock a.m.)

(The following proceedings were had in Chambers.)

Mr. Scoville: Plaintiffs have no exception to the [417] Court's 1 to 10.

(Testimony of Gilbert Ripka.)

Mr. Wilmer: I think, if it please the Court, the Defendants will except to the Court's Number 1, insofar as it impliedly excludes from the consideration of the jury the negligence of the husband, Herbert Noah Sanders. In other words, as worded the instruction completely separates the two claims, which the jury would imply that the negligence of the husband would not be imputed to the wife's estate.

We except to the Court's Number 2 or second instruction for the reason that it specifically excludes from the consideration of the jury the effect of the negligence of the husband, if found by the jury, against the wife.

That is likewise the basis for our exception to the Court's Number 3, in that it limits the issue of the negligence or effect of the negligence of the husband, if found by the jury, solely to the first cause of action.

That likewise is our basis for exception to the Court's Number 4 instruction, in that it excludes from the consideration of the jury the imputation of negligence on the part of the husband to the wife's estate.

Likewise it is our basis of exception to the Court's Number 6, in that it excludes from the consideration of the jury the possible effect of the negligence of the deceased, Herbert Noah Sanders, and the imputation thereof to the estate of his deceased [418] wife.

We have no exception to the remaining instructions.

The Court: I have numbered the Plaintiff's 1 to 8, the way they were given to me. I wonder if they are in the same order?

Mr. Scoville: Yes, they have been assembled in the same order.

The Court: I have numbered them as submitted to me, 1 to 8.

Plaintiffs requested Number 1 will be given with these modifications: In line 4, the word "do" is changed to "ordinary." And the same change in line 12, "do" is changed to "ordinary." Does counsel have any exceptions or objections as we go along?

Mr. Wilmer: We have none.

Mr. Scoville: We have none to the modification of Plaintiff's Number 1.

The Court: Number 2 will be refused as covered by the Court's 5 and 6. Those are the instructions where I define the issues in each of the claims.

Mr. Scoville: No objection.

The Court: Number 3 is refused as covered by the Court's 8.

Number 4 is refused as covered by the Court's Number 4, which is the Court's burden of proof instruction.

Number 5 will be given with these [419] modifications: In line 3 the word "traveler" is changed to "driver of a vehicle." In line 7, after the word "done," insert "under the same circumstances." Line 13, the word "travelers" changed to "driver."



Number 6, the first words in the first clause of the second sentence are stricken so that it begins: "You are instructed that it is established"——

Mr. Scoville: You are striking everything down to there?

The Court: Down to there. In other words, that is educational but we get right to the crux of it here by telling them, "You are instructed it is established"——

Then down in line 14 after the word "liable," insert "to plaintiffs."

Mr. Scoville: I believe this is, "Wilson Brothers Trucking Company." I notice the word "Transportation."

The Court: It should be "Trucking."

Mr. Scoville: Yes, sir; Wilson Brother Trucking Company.

The Court: Then the last sentence will be stricken because the rest of it says it all.

Number 7 is covered by the Court's 1.

Number 8. On that the defendant has submitted Number 4, which is this same instruction with the additional element of reducing the present value. I am going to give [420] the Defendants' Number 4 except the last paragraph of it. Plaintiff's Number 8 is refused because covered by Defendants' Number 4 as modified.

The Court: On defendant's request of instructions, Number 1 is refused insofar as it is covered by the Court's 9.

Mr. Wilmer: We except to the Court's refusal to instruct the jury that if they find the decedent

Sanders was suffering from active tuberculosis the table is inapplicable.

The Court: Number 2 will be given.

Number 3 is refused as covered by the Court's Number 10.

Mr. Wilmer: I believe it is covered.

The Court: Number 4 will be given as modified by striking the last paragraph.

Mr. Wilmer: On Number 4, we will except on the ground that in the absence of either expert testimony or an instruction covering the matter, that there is nothing from which the jury may accurately be lead to a proper determination of the meaning of actual or present value. In other words, it is our position that either or both must occur, that is, actuarial testimony or similar evidence as to how you compute present worth, or the Court's instructions must instruct them on how to do it.

I would like to renew our motion for a [421] directed verdict on the grounds stated at the close of the plaintiff's case, rather than reargue, unless the Court wants that done. The record may show that.

I believe also we indicated a desire to make the offer of proof with respect to the one witness, the Cammack boy.

The Court: Yes.

Mr. Wilmer: May the record show if the witness had been permitted to answer the question he would have stated that Mr. Sanders told him that when he went on a trip it was his habit to drive from twenty-eight to thirty-six hours at a stretch.

The Court: The motion for a directed verdict is denied.

I will give an hour and a half to each side for argument and counsel will be responsible for keeping track of their time. An hour for opening.

(The following proceedings in the courtroom.)

(Argument by counsel to the jury.)

The Court: At this time we will recess until 1:00 o'clock. At that time the arguments will be concluded and instructions given and the matter submitted to you. We will recess until 1:00 o'clock.

(Noon recess.)

(Argument by counsel concluded.) [422]

### COURT'S INSTRUCTIONS

The Court: Gentlemen, you have now heard all of the evidence in this case and the arguments of counsel. At this time it is my function and my duty to instruct you as to the law that applies to the case. It is your duty as Jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case and consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power; it must be exercised with sincere judgment, sound discretion and in accordance with the rules of law that will be stated to you in these instructions.

If, in the instructions, any rule or direction or idea be stated in varying ways no emphasis thereon is intended by me and none must be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all of the instructions and as a whole and to regard each in the light of the others.

I instruct you that although there is but a single complaint filed in this case there are actually two plaintiffs in the action and two separate claims or causes of action filed by the plaintiffs. Ralph Wanek, administrator of the estate of Herbert Noah Sanders, is the plaintiff in the first [423] claim or cause of action; and Ralph Wanek, administrator of the estate of Delphia F. Sanders, deceased, is the plaintiff in the second claim or cause of action. The case of each plaintiff is separate from and independent from that of the other. The law permits the claims of each plaintiff to be joined in a single complaint, because the claims arose out of the same accident. However, the rights of the plaintiffs, if any, and each claim or cause of action are separate, and the instructions given to you apply to each plaintiff unless otherwise stated. Accordingly, you are instructed to determine the claim or cause of action of each plaintiff separately to the same effect as if you were trying two separate suits or cases. In this connection, however, there is one exception to be noted. The defense of contributory negligence is submitted to you as against only the plaintiff in the first cause of action in the complaint, that is, as

against only the plaintiff Ralph Wanek as administrator of the estate of Herbert Noah Sanders, deceased. Therefore, the instructions concerning the subject of contributory negligence apply only as between that plaintiff and the defendants.

You are instructed that it is established that the defendant, Gilbert Ripka, at the time of the collision complained of, was the servant and employee of the defendant, Wilson Brothers Truck Line, Inc., a corporation, and he was acting within the scope of his employment and authority. Therefore, I [424] charge you that the conduct of the defendant, Gilbert Ripka, shall be deemed by you to be the conduct of the defendant, Wilson Brothers Truck Lines, Inc., a corporation. And if one is liable to the plaintiffs, both are liable.

Statements and arguments of counsel are not evidence in the case unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, the Jury must accept the stipulation as evidence and regard that fact as conclusively proved. The evidence in the case consists of the sworn testimony of the witness, all exhibits which have been received in evidence, and all facts which have been admitted or stipulated.

You are to consider only the evidence in the case, but in your consideration of the evidence you are not limited to the bare statements of the witnesses. On the contrary, you are permitted to draw from the facts which you find have been proved, such inferences as seem justified in the light of your experience. An inference is a deduction or conclusion,



which reason and common sense lead the Jury to draw from the facts which have been proved.

In the present action, certain testimony has been read to you by way of deposition. You are instructed that you are not to discount this testimony for the sole reason that it comes to you in the form of a deposition. It is entitled to the same consideration, the same rebuttable presumption that the [425] witness speaks the truth, and the same judgment on your part, with reference to its weight, as is the testimony of witnesses who have confronted you on the witness stand.

At times throughout the trial, the Court has been called upon to pass on the question of whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings, and are not to draw any inference from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the Court does not determine what weight should be given such evidence, nor does it pass on the credibility of the witness. As to any offer of evidence which has been rejected by the Court, you, of course, must not consider the same. As to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection. Any evidence ordered stricken out by the Court must be entirely disregarded.

You are made, by law, the sole judges of the evidence in this case, and of the credibility of the

witnesses. It is for you alone to determine the weight to be given to the evidence, and its effect and sufficiency to establish any fact, in support of which it has been offered. In so determining, you may take into consideration the apparent character of the witnesses, their appearance and deportment on the witness stand, the [426] extent of their knowledge of the things about which they have testified, any interest or motive that may appear to you, the manner in which they or any of them may be affected by any verdict which you render, the reasonableness and consistency of their statements; and from these considerations and any others that may have appeared to you in the case as it has been presented to you, you may judge and determine as to the credibility of each witness, and the weight and the effect and the sufficiency of his testimony.

If you believe that any witness has wilfully sworn falsely as to any material fact in the case, then you are at liberty to disregard the entire testimony of that witness, except insofar as it may be corroborated by other credible evidence in the case.

In arriving at your verdict in this case, you are not to be influenced by any sympathy or prejudice for or against any party. Neither sympathy nor prejudice has any place in your considerations. Your verdict must be that which is right and just under the evidence and the instructions given you by the Court.

In civil actions, and this is a civil action, the party, who asserts the affirmative of an issue, must carry the burden of proving it. In other words, the

burden of proof as to that issue is on that party. This means that if no evidence were given on either side of such issue your finding as to it [427] would have to be against that party. When the evidence is contradictory, the decision must be made according to the preponderance of the evidence, by which is meant, such evidence as when weighed with that opposed to it has more convincing force and from which it results the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the party carrying the burden of proof. Namely, the one who asserts the affirmative of the issue.

Negligence is the doing of some act, which a reasonably prudent person would not do; or the failure to do something which a reasonably prudent person would do, under the same or similar circumstances. It is the failure to use ordinary care in the management of one's property or person. Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs, in order to avoid injury to themselves and others.

Inasmuch as the amount of caution used by the ordinarily prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that in the exercise of ordinary care the amount of caution required will vary in accordance with the nature of the act and the sur-

rounding circumstances. To put the matter in another way, the amount of caution required by the law increases or decreases as does [428] the danger that should reasonably be apprehended.

The proximate cause of an injury is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the injury.

Contributory negligence is negligence on the part of a person injured which, concurring in some degree with the negligence of another, helps in proximately causing the injury of which the former thereafter complains. Contributory negligence, if it existed in connection with the occurrences now under consideration, would have consisted of negligence on the part of Herbert Noah Sanders, deceased, which contributed in some degree as a proximate cause of his death. The administrator of one who is guilty of contributory negligence in relation to his own death, may not recover from another person for that death. The reason for this rule of law is not that the fault of one justifies the fault of another, but simply that there can be no apportionment of blame and damages among the participating agents of causation.

The mere fact that an accident happened, considered alone, does not support an inference that some party or any party to this action was negligent.

The law does not permit you to guess or speculate



as to the cause of the collision in question. If the evidence is [429] equally balanced on the issue of negligence or contributory negligence or proximate cause, so that it does not preponderate in favor of the party making the charge, then such party has failed to fulfill the burden of proof, and your finding must be against that party on that issue.

You are instructed that it is the duty of every person operating a motor vehicle, to exercise ordinary care and diligence in operating said motor vehicle so that the same will not cause injury to other persons.

By ordinary care and diligence we mean such care and diligence as a person of ordinary prudence and diligence would commonly exercise under like circumstances; and the degree of care and diligence required by law is always proportionate to the danger that might reasonably be apprehended from a failure to exercise such ordinary care and diligence. A failure to exercise ordinary care and diligence, as the same is herein defined and explained, is negligence as that term is used in this case.

I instruct you that the traffic laws of the State of Arizona, in force and effect at the time and place of the collision involved in this case, required the driver of each of the vehicles involved to drive his vehicle upon the right half of the highway. And the driver of each vehicle was required also to pass the vehicle coming from the opposite direction on the right, giving to such vehicle at least one-half of [430] the main traveled portion of the roadway, as nearly as possible.



You are instructed that a driver of a vehicle on a public highway proceeding on the right-hand side and meeting a person traveling on the wrong side is not, himself, responsible for the consequences of any ensuing collision, if he does all that a reasonably careful person would have done under the same circumstances to prevent it. He is not required to anticipate that an approaching automobile might cross to the left and come into collision with him. A motorist has a right to assume that the driver of a vehicle coming from the opposite direction will obey the law, and to act upon such assumption, in determining his own manner of using the road. A driver, therefore, proceeding on the right side of the traveled way, may assume that the driver of a vehicle approaching on his left-hand side, will do all that a reasonably prudent person under all the circumstances would do to avoid a collision, which ordinarily would be to yield half of the way or turn out in time to avoid a collision, and that such driver will not force him, in violation of the law of the road, to turn from the part of the road on which he is lawfully driving.

The issues to be determined by you with regard to the plaintiff's first cause of action in this case, are these:

First, was the defendant, Gilbert Ripka, negligent? If you answer that question in the negative, you will return a [431] verdict for the defendants on the first cause of action. If you answer it in the affirmative you have a second issue to determine, namely: Was that negligence a proximate cause of

the death of Herbert Noah Sanders, deceased? If you answer that question in the negative, plaintiff is not entitled to recover on the first cause of action. But if you answer it in the affirmative, then you must find on a third question: Was the deceased, Herbert Noah Sanders, negligent? If you find that Herbert Noah Sanders was not negligent, after having found in the plaintiff's favor on the other two issues, you must then fix the amount of plaintiff's damages on the first cause of action and return a verdict in his favor. If you find that Herbert Noah Sanders was negligent, then you must determine a fourth issue, namely: Did that negligence contribute in any degree as a proximate cause of the accident? If you find that it did, your verdict must be for the defendants. But if you find that it did not and you have previously found there was negligence on the part of the defendant, Gilbert Ripka, which proximately caused the death of Herbert Noah Sanders, you must then fix the amount of plaintiff's damages on the first cause of action, and return a verdict in his favor.

The issues to be determined by you, with respect to the plaintiff's second cause of action, are these:

First, was the defendant, Gilbert Ripka, negligent? If you answer that question in the negative, you will return a [432] verdict for the defendants on the second cause of action. If you answer it in the affirmative, you have a second issue to determine, namely: Was that negligence the proximate cause of the death of Delphia F. Sanders, deceased? If

you answer that question in the negative, plaintiff is not entitled to recover on the second cause of action. But if you answer it in the affirmative, you then will find what damage plaintiff has thus been caused to suffer, and return a verdict in his favor on the second cause of action for the amount thereof.

As to the claim or cause of action of each plaintiff, the burden is upon the plaintiff to prove by a preponderance of the evidence that the defendants were negligent and that such negligence was a proximate cause of the death of plaintiff's decedent. To establish the defense of contributory negligence, which has been interposed by the defendants, to the claim or cause of action of Wanek as administrator of the estate of Herbert Noah Sanders, deceased, that is, the first cause of action set out in the complaint, the burden is upon the defendants to prove by a preponderance of the evidence that the plaintiff's decedent, Herbert Noah Sanders, was negligent, and that such negligence contributed, in some degree as a proximate cause of the death of such decedent.

As I have indicated to you in discussing the issues which you have to decide in this case, you should first determine the question of liability, before you undertake to fix an [433] amount that will compensate for damage, if any, found to have been suffered.

According to the American Experience Table of Mortality, as it has been read into evidence, the expectancy of life of one aged forty-six years, is twenty-three and eighty-one one-hundredths years. And the expectancy of one aged thirty-nine years.

is twenty-eight and ninety-one one-hundredths years. This table is to be considered by you, in arriving at the amount of damages, if you find that the plaintiffs are entitled to recover in the action. However, the restricted significance of this evidence should be noted. Life expectancy shown by the mortality tables is merely an estimate of the probable, average remaining length of life of all persons in our country of a given age, and that estimate is based on not a complete, but only a limited record of experience. Therefore, the inference that may be drawn from the tables, applies only to one who has the average health and exposure to danger of people of that age. Thus, in connection with this evidence, you should consider all other evidence bearing on the same issue, such as that pertaining to the occupation, health, habits and activity of the person whose life expectancy is in question.

If after a consideration of the law as given you by the Court, and of the evidence, you find that the plaintiffs are entitled to recover, it will be necessary for you to assess damages in favor of Ralph Wanek as administrator of the estate [434] of Herbert Noah Sanders, deceased, and Ralph Wanek as administrator of the estate of Delphia F. Sanders, deceased, separately. The amount of damages should be fixed at the amount of pecuniary loss to the estate of each of those two persons. It is not necessary that any witness should have testified to the amount of such loss, but you should take into consideration the earning capacity, habits, character and probable length of life of the deceased, insofar



as they appear in the evidence, and fix the damages at the present value of the probable accumulations by Herbert Noah Sanders and Delphia F. Sanders during their lifetime, had they lived their allotted time, according to the mortality tables read in evidence.

The amount of damages, if any, should be such as the Jury deems fair and just, under the evidence in the case. If you should find in favor of a plaintiff, then in estimating the damages to which he is entitled, you will take into consideration the earning power of money; and if you award him damages, you must determine the present value of his pecuniary loss, if any, calculated as bearing interest at the highest net rate that can be had on money safely invested. The present value of a sum of money payable in the future is what that sum is worth if paid presently, paid now.

In my instruction on damages I have used the term, "probable accumulations of the deceased." I will now explain that term to you. In actions such as these for damages for the [435] death of a person, the damages allowable are those suffered by the estate of the deceased person, because the untimely death of the deceased prevented him or her, as the case may be, from acquiring, saving and transmitting to his or her estate, the additional amount, property or other assets which he or she would have acquired, saved and transmitted, had he or she lived out the natural span of his or her life. The probable accumulations of a deceased does not include any amounts or things of value which the



deceased would have earned or otherwise acquired, but would have spent or otherwise disposed of prior to his or her death. In order to determine the probable accumulations of a deceased in this case, you will determine how much his or her estate would have increased in value between the actual date of death and the time he or she would have died, but for the accident involved herein.

You are further instructed that the loss of support, care and maintenance by the minor children of the decedents, due to the death of Mr. and Mrs. Sanders in this accident, is not involved in this action and accordingly will not be considered by you.

You have been instructed on the subject of the measure of damages in this action, because it is my duty to instruct you as to all the law that may become pertinent in your deliberations. I, of course, do not know whether you will need the instructions on damages. The fact they have been given to [436] you must not be considered as intimating any view of my own on the issue of liability or as to which party is entitled to your verdict.

If during the trial, or in the course of these instructions, I have said or done anything which has suggested to you that I am inclined to favor the claims or positions of either party, you will not suffer yourself to be influenced by any such suggestion. I have not expressed nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are or are not worthy of belief, or what inferences should be drawn from the

evidence. If any expression of mine has seemed to indicate an opinion, relating to any of those matters, I instruct you to disregard it.

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree, thereto. In other words, gentlemen, any verdict that you render in this case must be unanimous.

It is your duty as jurors to consult with one another, and to deliberate with a view to reaching an agreement. If you can do so, without violence to individual judgment.

Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced [437] it is erroneous. But do not surrender your honest convictions as to the weight or effect of the evidence, solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Upon retiring to the jury room, your first order of business will be to select from among your number one juror as your foreman. He will preside over your deliberations and he, the foreman, will be your spokesman in court.

For your convenience in the case, forms of verdict have been prepared; and, omitting the formal parts, I will now read them to you.

The first form of verdict: We the Jury, duly impaneled and sworn, in the above-entitled action,

upon our oaths, do find the issues made by the first cause of action in plaintiff's complaint, and the answer thereto, in favor of Ralph Wanek, administrator of the estate of Herbert Noah Sanders, deceased, and against the defendants Gilbert Ripka and Wilson Brothers Truck Lines, a corporation; and we do assess plaintiff's damages in the sum of (blank) dollars.

The second form of verdict is also with regard to the first cause of action of the complaint, and it, omitting the formal parts, reads: We the jury, duly empaneled and sworn, in the above-entitled action, upon our oaths, do find the issues made by the first cause of action in plaintiff's complaint and the answer thereto, in favor of the defendants, [438] Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, and against plaintiff Ralph Wanek, administrator of the estate of Herbert Noah Sanders, deceased.

The third form of verdict relates to the second cause of action of the complaint, and it, omitting the formal parts, reads: We, the jury, duly empaneled and sworn, in the above-entitled action, upon our oaths, do find the issues made by the second cause of action in plaintiff's complaint and the answer thereto, in favor of Ralph Wanek, administrator of the estate of Delphia F. Sanders, deceased, and against Gilbert Ripka and Wilson Brothers Truck Lines, a corporation, and we do assess plaintiff's damages in the sum of (blank) dollars.

The fourth and final form also relates to the second cause of action of the complaint, and it reads:

We, the jury, duly empaneled and sworn, in the above-entitled action, upon our oaths, do find the issues made by the second cause of action of plaintiff's complaint and the answer thereto, in favor of the defendants, Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, and against plaintiff, Ralph Wanek, administrator of the estate of Delphia F. Sanders, deceased.

You will take the forms of verdict with you to the jury room and when you have reached a unanimous agreement as to the verdicts in the cases, then the verdicts will be signed by the foreman. The foreman alone signs the verdict after you have agreed on the verdict. After that has been done [439] the jury will return, with the forms of verdict, into open court.

You may have all the exhibits in the case with you in the jury room, that is, all the exhibits that were admitted into evidence; and the Clerk will check them to be sure they are all there. Then they will be sent by the Bailiff to you in the jury room.

Do counsel have anything further?

Mr. Scoville: No further request, your Honor.

Mr. Wilmer: None, your Honor.

The Court: Gentlemen, you may retire in charge of the Bailiff.

(Jury retires from the courtroom.)

Mr. Wilmer: We have no further exceptions.

Mr. Scoville: Plaintiff has no exceptions. [440]

Reporter's Certificate

State of Arizona,  
County of Pima—ss.

I, Fred L. Baker, do hereby certify that I am an Official Court Reporter in the United States District Court, District of Arizona, and that as such Official Court Reporter, I attended the trial in the foregoing-entitled cause; that I took down in shorthand all the oral testimony adduced, and proceedings had; that such shorthand was reduced to writing under my supervision, and the foregoing 440 pages of typewritten matter, contain a full, true and correct transcript of my shorthand notes, taken by me as aforesaid.

Witness my hand this 22nd day of October, 1955.

/s/ FRED L. BAKER,  
Official Court Reporter.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD  
ON APPEAL

United States of America,  
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records,



papers and files of the said Court, including the records, papers and files in the case of Charles Crehore, General Administrator of Estates of Herbert Noah Sanders and Delphia F. Sanders, Plaintiff, versus **Gilbert Ripka and Wilson Brothers Truck Lines, Inc.**, a corporation, Defendants, numbered Civ-411 Prescott, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon, are the original documents filed in said case; and that the attached and foregoing copies of the minute entries and civil docket entry are true and correct copies of the originals thereof, remaining in my office in the city of Phoenix, State and District aforesaid.

I further certify that the said original documents, and said copies of the minute and docket entries, together with the original exhibits transmitted herewith, constitute the record on appeal in said case as designated in the Appellants' Designations filed therein and made a part of the record attached hereto, and the same are as follow, to wit:

1. Plaintiff's Amended Complaint.
2. Minute entry of December 17, 1954 (granting leave to file amended complaint).
3. Answer of Defendant Gilbert Ripka.
4. Answer of defendants Wilson Brothers Truck Lines, Inc., a corp., et al.
5. Minute entry of August 4, 1955 (proceedings of trial).

6. Minute entry of August 5, 1955 (further proceedings of trial).

7. Minute entry of August 6, 1955 (further proceedings of trial).

8. Minute entry of August 8, 1955 (further proceedings of trial).

9. Plaintiff's Requested Instructions.

10. Defendants' Requested Instructions.

11. Verdict on the first cause of action.

12. Verdict on the second cause of action.

13. Plaintiff's motion for Substitution of Plaintiff and for Judgment Upon Verdict, and Consent of Charles Crehore to Substitution as Plaintiff.

14. Defendant's Objection to Substitution of Plaintiff and Objection to Entry of Judgment Upon the Verdict.

15. Minute entry of October 10, 1955 (Order substituting plaintiff and for Judgment on Verdict).

16. Civil Docket Entry of October 10, 1955 (Clerk's notation of entry of judgment in civil docket under Rules 79(a) and 58).

17. Defendants' Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial.

18. Minute entry of November 7, 1955 (Hearing on motions for judgment and for new trial).

19. Minute entry of December 16, 1955 (Order denying motion for judgment and motion for new trial).

20. Notice of Appeal.

21. Reporter's Transcript of Proceedings.

22. Bond for Costs on Appeal.

23. Appellants' Designation, Amended Designation and Supplemental Amended Designation of Contents of Record on Appeal.

24. Order Extending Time to File Record on Appeal and Docket Appeal.

I further certify that all original exhibits admitted in evidence, or marked for identification and not withdrawn, as designated by the appellants, are transmitted herewith as a part of this record on appeal, to wit:

Plaintiff's exhibits 1 to 10, 12, 13, 15 to 19, 19-A, 20 to 34, 37, 43 and 44, admitted in evidence, and 11, 14, 35, 36, 38, 39, 40, 41, 42 and 50, marked for identification.

Defendants' exhibits A, B, C, D, E and G, admitted in evidence, and H, marked for identification.

I further certify that the Clerk's fee for preparing and certifying this record on appeal amounts to the sum of \$5.60, and that said sum has been paid by counsel for appellants.

Witness my hand and the seal of said Court, this 3rd day of February, 1956.

[Seal]      /s/ WILLIAM H. LOVELESS,  
Clerk.

[Endorsed]: No. 15033. United States Court of Appeals for the Ninth Circuit. Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, Appellants, vs. Charles Crehore, General Administrator of the Estate of Herbert Noah Sanders and Delphia F. Sanders, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed February 17, 1956.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 15033

GILBERT RIPKA and WILSON BROTHERS  
TRUCK LINES, INC., a Corporation,

Appellants,

vs.

CHARLES CREHORE, Administrator of the  
Estates of HERBERT NOAH SANDERS and  
DELPHIA F. SANDERS, Deceased,

Appellee.

CONCISE STATEMENT OF POINTS TO BE  
RELIED ON BY APPELLANTS ON  
APPEAL

Appellants herein, Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, intend to rely upon the following points on appeal:

1. The District Court erred in admitting in evidence special letters of administration of Ralph Wanek and denying motions of appellants for a directed verdict, because of the insufficiency of proof as to the capacity of said administrator.

2. Misconduct of counsel for the appellee prejudicial to the rights of appellants whereby they were denied a fair trial.

3. Error of the District Court in failing to give instructions requested by appellants and in giving



instructions requested by appellee, and in giving instructions of its own motion.

4. Error of the District Court in substituting a general administrator for a special administrator, and in ruling that a special administrator has the capacity under the laws of Arizona to maintain a wrongful death action.

5. The verdict in each cause of action and the judgment entered thereon was the result of passion and prejudice, which vitiates the entire verdict and the judgment entered thereon.

6. There is no evidence whatsoever, of any kind, which would support the verdict of the jury, in either of the causes of action and the judgment entered thereon.

7. Appellants, by reason of the sympathy, passion and prejudice of the jury, have been denied a fair trial and the interests of justice require that a new trial be granted to appellants.

Respectfully submitted,

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Appellants.

Service of copy acknowledged.

[Endorsed]: Filed January 17, 1956.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD DEEMED MATERIAL TO A CONSIDERATION OF THIS APPEAL

Come Now Gilbert Ripka and Wilson Brothers Truck Lines, Inc., a corporation, appellants herein, and designate the following portions of the record as material to a consideration of this appeal:

1. Plaintiff's Amended Complaint. (Record No. 1.)
2. Answer of defendant Gilbert Ripka. (Record No. 3.)
3. Answer of defendant Wilson Brothers Truck Lines, Inc., a corporation. (Record No. 4.)
4. Minute entry of August 4, 1955. (Record No. 5.)
5. Minute entry of August 5, 1955. (Record No. 6.)
6. Minute entry of August 6, 1955. (Record No. 7.)
7. Minute entry of August 8, 1955. (Record No. 8.)
8. Plaintiff's Requested Instruction No. 8. (Portion of Record No. 9.)
9. Verdict on the first cause of action. (Record No. 11.)
10. Verdict on the second cause of action. (Record No. 12.)
11. Plaintiff's Motion for Substitution of Plaintiff and for Judgment Upon Verdict. (Portion of Record No. 13.)

12. Defendants' Objection to Substitution of Plaintiff and Objection to Entry of Judgment Upon the Verdict. (Record No. 14.)

13. Minute Entry of October 10, 1955. (Record No. 15.)

14. Civil Docket Entry of October 10, 1955. (Record No. 16.)

15. Defendants' Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial. (Record No. 17.)

16. Minute Entry of November 7, 1955. (Record No. 18.)

17. Minute Entry of December 16, 1955. (Record No. 19.)

18. Notice of Appeal. (Record No. 20.)

19. Reporter's Transcript of Proceedings. (Record No. 21.)

20. Bond for Costs on Appeal. (Record No. 22.)

21. Appellants' Designation, Amended Designation and Supplemental Amended Designation of Contents of Record on Appeal. (Record No. 23.)

22. Order Extending Time to File Record on Appeal and Docket Appeal. (Record No. 24.)

23. All exhibits admitted in evidence.

Dated February 7, 1956.

SNELL & WILMER,

By /s/ MARK WILMER,

/s/ JAMES H. O'CONNOR,

Attorneys for Appellants.

Service of copy acknowledged.

[Endorsed]: Filed February 9, 1956.

